

CLOSING STATEMENTS

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1 STATE OF MINNESOTA DISTRICT COURT
 2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
 3 - - - - -
 4 The State of Minnesota,
 5 by Hubert H. Humphrey, III,
 6 its attorney general,
 7 and
 8 Blue Cross and Blue Shield
 9 of Minnesota,
 10 Plaintiffs,
 11 vs. File No. Cl-94-8565
 12 Philip Morris Incorporated, R.J.
 13 Reynolds Tobacco Company, Brown
 14 & Williamson Tobacco Corporation,
 15 B.A.T. Industries P.L.C., Lorillard
 16 Tobacco Company, The American
 17 Tobacco Company, Liggett Group, Inc.,
 18 The Council for Tobacco Research-U.S.A.,
 19 Inc., and The Tobacco Institute, Inc.,
 20 Defendants.
 21 - - - - -

22 TRANSCRIPT OF PROCEEDINGS
 23 VOLUME 78, PAGES 15668 - 15937
 24 MAY 7, 1998
 25

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1 P R O C E E D I N G S.
 2 THE CLERK: All rise. Ramsey County
 3 District Court is again in session, the Honorable
 4 Kenneth J. Fitzpatrick now presiding.
 5 (Jury enters the courtroom.)
 6 THE CLERK: Please be seated.
 7 THE COURT: Good morning.
 8 (Collective "Good morning.")
 9 THE COURT: Counsel.
 10 MR. SASSEVILLE: May it please the court,
 11 counsel. Good morning, ladies and gentlemen.
 12 (Collective "Good morning.")
 13 MR. SASSEVILLE: My name is David
 14 Sasseville. You haven't heard from me in this trial.
 15 I'm a lawyer with the Lindquist & Vennum law firm in
 16 Minneapolis, which is Liggett Group, Inc.'s local
 17 counsel in Minnesota. I'm privileged to be here to
 18 address the jury on behalf of Liggett.
 19 I've alternated trial coverage during last 15
 20 weeks with Steven Kelly, sitting behind me, and
 21 perhaps symbolically we've been tucked away over here
 22 on the side of the courtroom with Mr. Ciresi's team
 23 of lawyers on the one side and the non-Liggett
 24 defendants' lawyers on the other side. The reason
 25 that I haven't been here before to talk to you is

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1 that Liggett has played a very unique and very
 2 limited role in the trial. Yesterday Judge
 3 Fitzpatrick reminded you that Liggett Group settled

4 its claims with the state of Minnesota a little over
5 a year ago. However, Liggett did not settle with the
6 state of -- with Blue Cross and Blue Shield of
7 Minnesota. And so as I stand before you today,
8 Liggett faces claims for hundreds of millions of
9 dollars by Blue Cross and Blue Shield. The judge
10 instructed you yesterday that those claims include
11 conspiracy claims that Liggett got together with
12 these other defendants and conspired to violate
13 Minnesota law. One of the claims is that Liggett
14 conspired with the other defendants to violate
15 Minnesota's antitrust laws by restraining trade. At
16 the same time, Liggett, as you know, is not well-
17 loved by the other defendants. In fact Mr. LeBow,
18 the chairman of Liggett, testified that Liggett has
19 been sued by these other defendants in the state of
20 North Carolina. And so as I've sat over there with
21 the defendants on one side and the plaintiffs on the
22 other, I've been continually reminded of the old
23 expression "Caught between the devil and the deep
24 blue sea."

25 Ladies and gentlemen, you have a very awesome
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1 responsibility in this case, but I marveled over the
2 past 15 weeks at how you've attentively and patiently
3 listened to all the evidence and paid attention and
4 studied everything that you've seen and heard in this
5 courtroom. You've heard from chemists, doctors,
6 pharmacologists, empidemiologists, statisticians,
7 economists, historians, marketing executives and
8 lawyers, you've heard from lots and lots of lawyers,
9 and from my vantage point, everything that you've
10 seen and heard really bears on two fundamental
11 questions. The first is whether, in the face of
12 growing statistical and scientific evidence over the
13 past 45 years, did these defendants conspire with one
14 another to perpetuate demand for cigarettes in the
15 United States, to keep a market that otherwise would
16 have disappeared, and two, did individual tobacco
17 companies, in selling cigarettes to earn profits to
18 gain market share, engage in activities that violated
19 Minnesota law?

20 With these two questions in mind, I'd like to --
21 like to focus your attention very briefly on the
22 facts in this case that concern Liggett. Some of you
23 might remember that in December of 1953, the heads of
24 all of the U.S. tobacco companies, with one
25 exception, got together at the Plaza Hotel to plan a

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1 strategy to deal with the growing smoking-and-health
2 issue. The one exception was Liggett. Liggett did
3 not attend the Plaza Hotel meeting in 1953.

4 There's an obscure document that came into
5 evidence in this case that some of you know as the
6 Frank Statement. The Frank Statement was the
7 culmination of the efforts of the tobacco companies
8 to respond to the smoking-and-health issue. The only

9 company that did not sign onto the Frank Statement
10 among the U.S. tobacco manufacturers was Liggett.

11 There was an undertaking concerning research
12 into smoking and health set forth in the Frank
13 Statement. That undertaking led to the creation of
14 what is known as the TIRC or today the CTR. The
15 Tobacco Institute Research Committee was an
16 organization that was formed by these same U.S.
17 tobacco companies, again with one exception, that was
18 Liggett.

19 One of the special duties of the TIRC was to
20 engage in research on smoking and health, independent
21 research on smoking and health, and in that regard a
22 very important part of the plaintiffs' claims in this
23 case has to do with something that came into evidence
24 known as the gentlemen's agreement. It was allegedly
25 an agreement among all of the U.S. tobacco companies,

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1 again with one exception, not to engage in in-house
2 animal testing in U.S. laboratories. The plaintiffs'
3 own witnesses in this case testified several times to
4 the fact that the sole company that was not a party
5 to this so-called gentlemen's agreement was Liggett.
6 And in that regard, also, the plaintiffs submitted a
7 great deal of evidence that confirms that Liggett,
8 among all of the tobacco companies, was the only one
9 that was critical of what the TIRC was doing in terms
10 of carrying out its charge of researching smoking and
11 health. Liggett alone was the only U.S. Tobacco
12 Company that openly criticized the work of the TIRC.

13 The plaintiffs offered Exhibit 11028 through Dr.
14 Hurt. In this document it's clear that Liggett
15 through the 1950s expressed doubt about the sincerity
16 of the TIRC's motives and concern the TIRC was
17 supporting, in quotes, almost without exception,
18 projects which were not related directly to smoking
19 and lung cancer. Liggett felt that the problem was
20 sufficiently serious to justify large-scale
21 investment by Liggett directly in research of its
22 own.

23 The plaintiffs also offered into evidence
24 Exhibit 10125 in which it's shown that Liggett
25 insisted on discussing the major scientific problem

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1 facing the industry, which, of course, was the issue
2 of smoking and health. Liggett openly expressed to
3 the other tobacco companies the view that, in quotes,
4 the scientific problems which faced the industry are
5 of such nature and magnitude that a substantially
6 increased research effort is required for any real
7 progress toward that goal. This is a document that
8 the plaintiffs introduced. And far from showing that
9 Liggett was a co-conspirator to suppress research on
10 smoking and health to develop safer products, these
11 documents that plaintiffs have offered prove that, if
12 anything, Liggett was a lone wolf. Liggett, rather
13 than a co-conspirator, was promoting and actually

14 conducting meaningful research, biological research
15 on smoking and health.

16 You've heard a lot of evidence in this case,
17 too, about the ammoniation of tobacco, the alleged
18 attempts by the defendant tobacco companies to
19 increase the kick of nicotine in cigarette smoke by
20 increasing the pH through the ammoniation of tobacco.
21 The plaintiffs' first two witness in -- witnesses in
22 this case, Dr. Hurt and Dr. Robertson, both testified
23 that Liggett was the only U.S. Tobacco Company that
24 did not sell brands of cigarettes that contained
25 ammoniated tobacco. In this regard Liggett is

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1 different.

2 A very significant part of the plaintiffs' case
3 in this trial has been the charge that the tobacco
4 companies deliberately targeted underage smokers,
5 children and minor teen-agers, in their advertising,
6 marketing and promotional strategies in order to
7 secure replacement smokers. Ladies and gentlemen, if
8 you recall the evidence in this case, you did not see
9 one single piece of advertising from Liggett or one
10 piece of promotional materials from Liggett that
11 targeted or even remotely appealed to children,
12 teen-agers, or young adults. Mr. LeBow testified
13 that the average age of the smokers of the Liggett
14 brands, which are Eve, Lark, L&M and Chesterfield, is
15 over 50 years old. The people that smoke Liggett
16 brand of cigarettes are grandmas and grandpas,
17 they're retired people, they're mature adults. They
18 are not children, they are not teen-agers. Liggett
19 never has, and does not, and never will market to
20 youth. In fact, Mr. LeBow confirmed that today
21 Liggett does not advertise at all.

22 In this regard, I think that you should recall
23 something that I find significant, and indeed
24 courageous on the part of Mr. LeBow, when you
25 consider the fact that he is the CEO of a publicly-

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1 held company. In this trial Mr. LeBow testified that
2 his hope and belief is that in 25 to 30 years,
3 Liggett will be out of the cigarette business. He
4 testified, and I quote, "If you're not going to sell
5 to children, really, truly not selling to children,
6 you're not going to have any business by definition
7 in 30 years."

8 Mr. LeBow testified about three other things
9 that radically distinguish Liggett from the other
10 tobacco companies. First, Liggett is the only
11 cigarette company in the United States that has
12 admitted that there is a causal connection between
13 cigarette smoking and lung cancer and other diseases.
14 Second, Liggett is the only U.S. tobacco company that
15 admits that nicotine is addictive. In fact, Liggett
16 prints a warning label on its packaging that nicotine
17 is addictive. And as an aside, you'll recall that
18 Mr. LeBow testified that after Liggett began printing

19 this warning on its packaging, Liggett's cigarette
20 sales in the United States dropped by 50 percent.
21 Liggett is paying a price for its responsibility, and
22 I'll talk to you later about the fact that Liggett
23 has been paying a price for over 45 years, during the
24 entire term of this alleged 45-year conspiracy.

25 Finally, Mr. LeBow testified that of all the
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1 U.S. tobacco companies, only Liggett prints the
2 ingredients of its cigarette right on the carton, and
3 Liggett does this voluntarily, not as part of any
4 agreement, not as part of any obligation.

5 This brings me to my final point, and it's one
6 that I hope you take with you and you keep in mind as
7 you deliberate your verdict after you've heard from
8 the other defendants, after you've heard from Mr.
9 Ciresi in this case, and you weigh and consider all
10 the evidence, I'd like you to remember what is
11 displayed in an exhibit that came in through
12 Professor Scheffman, Exhibit X2166, which Mr. Kelly
13 is now putting up, and which is extremely of poor
14 quality, by the way. You'll see in this exhibit that
15 in 1950 Liggett had nearly a 20 percent share of the
16 market for cigarettes in the United States. Liggett
17 is about -- up on the left side, along that vertical
18 axis, you'll see Liggett, it's a blue line, and it
19 shows in 1950, just under 20 percent of the market.
20 That was before the so-called health scare, it was
21 before the Wynder article, the Reader's Digest
22 publication, the widespread dissemination showing
23 that there was a causal connection between smoking
24 and health. Liggett stood a very firm number three
25 among the U.S. tobacco companies. And you'll see

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1 what happened to Liggett over the course of time,
2 beginning in the early 1950s, at the same time that
3 these other companies were meeting at the Plaza Hotel
4 and they were printing the Frank Statement in over
5 400 newspapers throughout the United States, forming
6 the TIRC, allegedly participating in the gentlemen's
7 agreement to suppress research, ammoniating
8 cigarettes, creating Joe Camel and so on, Liggett's
9 share has steadily declined to the point where you'll
10 see, in 1964, coincidentally, that Philip Morris
11 actually surpassed Liggett in terms of market
12 position, there's a crossover at that point, and
13 after 1964 you'll see that Liggett's market share
14 continued to decline, there's a brief little hump in
15 the early 1980s, but you'll see that today and you'll
16 recall Mr. LeBow testifying that Liggett has less
17 than a two percent share of this market.

18 Ladies and gentlemen of the jury, if you believe
19 that the plaintiffs have proved there was a 45-year
20 conspiracy to create, using unlawful means, demand
21 for cigarettes in this company, and that there were
22 attempts using unlawful means by the defendants to
23 grab market share, to secure replacement smokers, to

24 keep people addicted to cigarettes, then I submit
25 that this exhibit and the facts that we've talked
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1 about that show that Liggett is different, has acted
2 differently, compels that you exonerate Liggett. If
3 Liggett was a co-conspirator, it was a very poor one,
4 ladies and gentlemen, and the evidence that's on
5 display I think establishes that Liggett was not a
6 conspirator, Liggett did nothing to restrain trade in
7 Minnesota, that at all times Liggett acted
8 responsibly, and it pursued its business the way that
9 it should have pursued its business, and you must
10 find that Liggett is not liable to Blue Cross and
11 Blue Shield of Minnesota in this case.

12 Thank you very much.

13 MR. BLEAKLEY: May it please the court.

14 Good morning, ladies and gentlemen.

15 (Collective "Good morning.")

16 MR. BLEAKLEY: You know, seeing you arrive
17 here in the courtroom last week with your matching
18 T-shirts reminded me of what a special and unique
19 legal system we have here in this country. Nowhere
20 else do ordinary people like us decide civil,
21 non-criminal disputes, although I have to admit that
22 not even here in the United States do we often ask
23 people like you to sit for four months in civil
24 cases. Everyone involved in this case realizes what
25 a burden it has been for you to come here every day

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1 for four months. We remember some of the things that
2 you said when we were selecting this jury about how
3 difficult it was going to be for some of you. We all
4 know that and we all appreciate your service on this
5 jury.

6 This has been a long and sometimes complicated
7 trial. You've heard a lot of very technical
8 testimony and seen a lot of very technical exhibits,
9 and, yes, I suppose I even have to admit that from
10 time to time it may have gotten even a little boring.
11 Very soon it will be over, though, and you all will
12 go to the jury room and decide this case, and among
13 the things you will decide is whether or not the
14 plaintiffs are entitled to recover the 1.77 billion
15 dollars in compensatory damages that they seek. And
16 none of us can tell you how to make that decision. I
17 and my colleagues and Mr. Ciresi can try to persuade
18 you. The court has given you instructions and will
19 give you further instructions on the law. But when
20 you go into that jury room, none of us can tell you
21 how to get to the final decision in this case. It's
22 completely up to you.

23 You'll notice that I referred to the state of
24 Minnesota and Blue Cross Blue Shield as the
25 plaintiffs in this case, and I did that and we've

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1 done that in this case because that's what they are,
2 they are plaintiffs. We know that it's not easy for
3 you to put aside the fact that the state of Minnesota
4 is your state government or that Blue Cross Blue
5 Shield is a non-profit corporation, but in this case
6 they are plaintiffs and they have the same burdens of
7 proof that any plaintiff in any lawsuit has. You'll
8 recall yesterday Judge Fitzpatrick told you that all
9 parties, corporations, governments, individuals, are
10 equal under the law, and the state of Minnesota and
11 Blue Cross Blue Shield have precisely the same burden
12 in this case that any plaintiff has, and the court
13 spelled that out for you in its instructions
14 yesterday, which is to prove by the greater weight of
15 the evidence each and every claim that they have
16 made.

17 Defendants don't have to prove anything. We've
18 offered evidence, we're going to argue some of that
19 evidence to you, but we ask you to remember when you
20 go into the jury room that the plaintiffs have the
21 burden of proving that they are entitled to recover
22 any money, let alone 1.77 billion, and they have the
23 burden of proving it by the greater weight of the
24 evidence.

25 Now let me tell you a little bit about how the
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1 defense lawyers are going to proceed here today in
2 making our presentations to you. Obviously you've
3 already heard from counsel for Liggett, and obviously
4 I'm going next. There are going to be five of us --
5 sorry to tell you that -- but there are going to be
6 five of us who are going to make presentations.
7 They'll vary in length. I and David Bernick, counsel
8 for Brown & Williamson, and Bob Weber, counsel for
9 Reynolds, are going to cover the key and common
10 issues that go throughout this case. I'll go first,
11 David Bernick will go second, then John Monica,
12 counsel for Lorillard, will give you some closing
13 remarks that deal with issues of particular relevance
14 to his client, Mike Corrigan, counsel for B.A.T
15 Industries, also will argue for you on behalf of his
16 client, but the common arguments that run through
17 this case will be presented primarily by myself, by
18 David Bernick and by Bob Weber, and what we're going
19 to try to do is to convince you that the plaintiffs
20 have failed to sustain their burden of proof in this
21 case.

22 I'm going to tell you how David Bernick and Bob
23 Weber and I are going to divide up the key and common
24 themes and issues, but first I want to tell you a
25 little bit -- or explain a little bit to you about
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1 how and why we made our defense presentation of the
2 evidence the way we did. The first point that I want
3 to make to you is that we tried very hard to
4 coordinate our defense in this case. It's been a

5 long trial, we knew it was going to be a long trial,
6 and we've tried very hard to divide up the principal
7 issues in the case. We've tried very hard to avoid
8 duplicating one another. It may not have seemed
9 that -- that way to you sometimes, but we tried never
10 to call more than one or two witnesses on a given
11 point or a given issue. At the request of the court
12 only one of us examined and cross-examined each
13 witness, even though other attorneys for other of the
14 defendants may have had an issue of particular
15 interest to his or her client, nevertheless, only one
16 of us examined or cross-examined a witness.

17 Throughout the course of the trial we've
18 continuously assessed how the case was going in and
19 the evidence and what issues seemed to be most
20 significant, and we streamlined our presentation.
21 Every single week we made decisions to cut witnesses,
22 which witnesses were essential, and we called only
23 those that we thought were necessary and we didn't
24 call those who we thought were marginal. And
25 especially as this case and the trial approached its

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1 fourth month, we tried very hard to finish up on
2 issues that were of real importance in the case.

3 I know this is small consolation to those of you
4 who have had to sit here for -- I guess it's about 16
5 weeks now, but we did try to be efficient. I won't
6 tell you how many witnesses we had on our original
7 witness list at the beginning of trial.

8 Now as I said, we did this not just to shorten
9 the trial, but we did this in order to focus our and
10 your attention on what seemed to be emerging as the
11 key issues in this case. Those issues were like the
12 alleged manipulation of nicotine through the use of
13 ammonia, things like the alleged deliberate targeting
14 of minors in the defendants' advertising, the
15 allegation that the defendants conspired with one
16 another to refrain from putting safer cigarettes on
17 the market, and of course whether or not the
18 plaintiffs in this case have actually incurred any
19 increased health-care costs in the health-care
20 programs that are involved in this case. This is
21 where we put our money, so to speak, and this is
22 where we believe and where we're going to try to
23 persuade you today that the plaintiffs have failed to
24 sustain their burden.

25 Now what are the key issues and how are David

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1 Bernick and Bob Weber and I going to divide them up?
2 Well it's going to be somewhat similar to the way we
3 divided them up in our opening statements, the
4 opening statements that we gave to you back the day
5 after the Super Bowl. Seems like a long time ago.
6 I'm going to focus, as I did in my opening statement,
7 on the evidence of whether or not the defendants'
8 alleged wrongful conduct has cost the plaintiffs
9 money -- we call that causation and damages, we

10 lawyers -- whether or not the wrongful conduct with
11 which the plaintiffs have charged the defendants has
12 actually caused the state and Blue Cross Blue Shield
13 to incur increased health-care costs in the three
14 programs that are involved in this case, Medicaid,
15 the state Medicaid-like program called GAMC, and Blue
16 Cross insurance.

17 David Bernick, who's going to go second, is
18 going to talk to you, as he did in his opening
19 statement, about the conduct of the industry and the
20 defendants in particular in this case, and he's going
21 to try to persuade you that the defendants have acted
22 lawfully and responsibly. Bob Weber, who will follow
23 John Monica and Mike Corrigan, is going to be our
24 clean-up batter in the case. He's going to finish up
25 for us. He's going to talk about the youth marketing

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1 issue, he's going to talk about the plaintiffs'
2 fundamentally flawed and untrustworthy damage
3 estimate or guesstimate, and he's going to summarize
4 for us.

5 Okay. My subject. As I said, it's basically
6 the same as the subject I talked to you about in my
7 opening statement all those weeks ago. I said there
8 that the plaintiffs would fail to prove by the
9 greater weight of the evidence that the allegedly
10 wrongful conduct of the defendants cost the
11 plaintiffs money, cost the plaintiffs money in the
12 areas where they claim it cost them money in this
13 case: Medicaid, GAMC, and Blue Cross insurance.

14 Now let me show you how and why the defendants
15 believe that the plaintiffs have failed to sustain
16 their burden. What did the plaintiffs have to prove?
17 That's a question, I'm sure -- you'll go into the
18 jury room, and after you get yourselves organized,
19 you'll ask yourselves: What did the plaintiffs have
20 to prove in order to satisfy you that they incurred
21 increased health-care costs because of the
22 defendants' wrongful conduct? Well, I'm going to
23 suggest to you that what they had to prove is that
24 there was something about the way the defendants made
25 and sold cigarettes that cost them money, something

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1 unlawful about the way the defendants made and sold
2 cigarettes that cost them money. That's what I'm
3 going to suggest to you that the plaintiffs had to
4 prove. And you notice I put that word "wrongful" or
5 "unlawful" in there. The plaintiffs had to prove
6 that there was something unlawful about the way the
7 defendants made and sold cigarettes that cost them
8 money, and the reason why is because, as you know,
9 the manufacture and sale of cigarettes in Minnesota
10 and everywhere else in the United States is lawful
11 and has been lawful for a long, long time. The
12 public policy issue of whether the sale and
13 manufacture and use of cigarettes should or shouldn't
14 be unlawful is not involved in this case. That

15 public policy issue has been resolved, and it's been
16 resolved under a fairly complex regulatory scheme in
17 which the sale and manufacture of cigarettes is
18 regulated at both -- and use is regulated at both the
19 federal and the state level and is taxed at both the
20 federal and the state level. The federal government
21 and the state government of Minnesota have considered
22 cigarettes and what should be done about cigarettes
23 for decades and decades, and the resolution that has
24 been reached is that the manufacture and sale and use
25 of cigarettes is lawful, subject to very heavy

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1 regulation at both the federal and the state level,
2 and taxes at both the federal --

3 MR. CIRESI: Your Honor, I'm going to
4 object to the repeated reference to taxes as not in
5 accordance with the court's instructions.

6 THE COURT: Okay. Move on, counsel.

7 MR. BLEAKLEY: Okay. Now Minnesota, as you
8 know from the testimony that was given to you by
9 Professor Berman, University of Minnesota,
10 experimented with prohibition a long, long time ago,
11 as did many other states, but for the last 80-plus
12 years the sale of cigarettes in Minnesota has been
13 and is today lawful, despite considerable evidence on
14 the part of the state of Minnesota and belief by the
15 state of Minnesota that cigarette smoking was risky,
16 hazardous, unhealthy, and costly.

17 Remember -- very hard to see, but this is the
18 State of Minnesota, Department of Education
19 curriculum for elementary schools in June of 1928
20 where that curriculum pointed to the fact that
21 tobacco -- tobacco has harmful effects on the body,
22 the heart, and the nervous system, injures delicate
23 lining of nose, throat and lungs, and use is costly.
24 Seventy years ago in 1928. And of course in the
25 Minnesota plan for non-smoking and health, which you

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1 heard Professor Berman talk about all those years
2 later in the mid-1980s, once again the state of
3 Minnesota talked about the economic costs
4 attributable to cigarette smoking. The point of all
5 of this, ladies and gentlemen, is that this case
6 involves the issue of whether something that the
7 defendants did in making and selling cigarettes that
8 was wrongful or unlawful caused the state to
9 increase -- to incur increased health-care costs.

10 Just think about how detailed and pervasive the
11 regulatory scheme is under which cigarettes are sold,
12 and there is no allegation in this case that any of
13 the existing statutes or regulations that I talked
14 about have been violated. There's no allegation in
15 this case that the state -- that warning labels that
16 have been required by the federal government have not
17 been put on every pack of cigarettes sold in the
18 United States since 1966. There's no allegation in
19 this case that the defendants have unlawfully

20 advertised on television or radio since that was
21 banned 20-odd years ago. There is no allegation in
22 this case that any of the warning labels that have
23 been used have failed to be put on low tar and
24 nicotine cigarettes. There is no allegation in this
25 case that the defendants have failed to disclose the

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1 amount of tar and nicotine in their cigarettes since
2 that was required back in the 1970s by the Federal
3 Trade Commission.

4 Under this complex regulatory scheme, the
5 defendants have sold cigarettes in the state of
6 Minnesota, and they've made a profit -- not nearly as
7 much profit in Minnesota as the plaintiffs would like
8 you to believe. Remember Mr. Much, the plaintiffs'
9 expert, who testified that the total net profits that
10 have been earned by the defendants in the state of
11 Minnesota in the last 50 years are 350 million
12 dollars -- 40 years, excuse me. But the cigarette
13 companies have made a profit in Minnesota over the
14 last 50 years, there's no question about that.

15 Now, Mr. Ciresi is going to get up here
16 tomorrow, I don't doubt, and tell you that the
17 defendants have violated a whole bunch of Minnesota
18 statutes, and the court has instructed you on the
19 applicable law under each of these statutes, but they
20 all boil down to two basic factual contentions. One
21 is the conduct of the tobacco companies has misled
22 the public about the health risks of smoking, has
23 caused people to smoke, to take up smoking, and to
24 continue to smoke who would not otherwise have done
25 so, and that that has cost the state and Blue Cross

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1 money. And secondly, that the defendants could have
2 made a safer cigarette and that that has cost them
3 money. Those are really the two key issues in this
4 case that you have to resolve in order to determine
5 whether or not the plaintiffs are entitled to recover
6 any compensatory damages.

7 If the plaintiffs haven't sustained their burden
8 on those two issues, then they're not entitled to
9 recover any money. It's that simple. And it is the
10 position of the defendants that the plaintiffs have
11 not sustained their burden on either of those counts
12 and therefore they're not entitled to recover any
13 compensatory damages, let alone the 1.77 billion
14 dollars in compensatory damages that was talked about
15 by the plaintiffs' damage experts.

16 You know, when I said that this case is not
17 about -- is only about whether the defendants have
18 done something wrong in the making and selling of
19 cigarettes that cost them money, there's something
20 else the case is not about. It's not about
21 popularity. Believe me, the defendants are well
22 aware of the fact that they're not very popular these
23 days. They're well aware of the fact that cigarette
24 smoking is not very popular this -- these days. I

25 told you in my opening statement that I didn't doubt
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1 that some of you would conclude by the end of this
2 trial that these defendants should have admitted that
3 cigarette smoking causes diseases many years ago. I
4 said that some of you would undoubtedly conclude that
5 these defendants have been stubborn and foolish. I
6 said to you in my opening statement that I didn't
7 doubt that some of you would conclude that lawyers
8 have played a role in the scientific area that you
9 would conclude they shouldn't have, and you may have
10 come to that conclusion today. And I'm not telling
11 you that those issues aren't relevant to any of your
12 considerations in this case, what I'm saying to you
13 is that when you go into the jury room, you have to
14 decide whether something wrongful about the way the
15 defendants made and sold cigarettes caused the
16 plaintiffs to incur increased health-care costs in
17 Medicaid, GAMC and Blue Cross insurance.

18 Remember when Mr. Ciresi asked such witnesses as
19 Walker Merryman from The Tobacco Institute and Dr.
20 James Glenn from CTR that asked questions like you
21 know that this case is about what the defendants knew
22 and what they told the public? Well that's part of
23 the equation and only part of the equation, ladies
24 and gentlemen. You also have to decide, based on the
25 evidence that you've heard in this case, what they

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1 needed to know, what they did in fact know, what
2 impact, if any, the defendants' statements about
3 smoking and health have on people's understanding and
4 appreciation of the risks of smoking, and what effect
5 it had on whether they took up smoking or continued
6 to smoke. You have to decide that, too, ladies and
7 gentlemen.

8 The plaintiffs would like you to believe that
9 the defendant cigarette companies controlled the
10 information environment, but it isn't so. The
11 plaintiffs would like you to believe that the
12 defendants pulled the wool over the eyes of the
13 public health community and the public about the
14 health hazards of smoking. That's not what the
15 evidence established in this case. The plaintiffs
16 would like you to think that significant numbers of
17 people were fooled or reassured, and there is no
18 evidence on that in this case either.

19 Let's look at what the evidence was and let's
20 look, first, at what evidence the plaintiffs offered
21 on this issue. After all, it was their burden. I
22 remember being struck by how little Mr. Ciresi said
23 about this in his opening statement. He talked for
24 nearly two hours, but he never once described a
25 witness who was going to come into this courtroom and

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1 say significant numbers of people were misled/fooled/
2 reassured about the health risks of smoking. He
3 didn't identify any such witness. He didn't tell you
4 who the witnesses were or what the evidence was that
5 was going to establish that there was a significant
6 impact on the behavior of consumers that led to
7 increased health-care costs for the plaintiffs, and
8 that's where we are today.

9 The plaintiffs called 16 live witnesses and 10
10 witnesses by deposition over a period of about eight
11 weeks. Not a consumer, not a smoker, not a Medicaid
12 recipient, not a GAMC recipient, not a Blue Cross
13 insured, not a one testified that he or she was
14 fooled, misled, or reassured. No expert came in here
15 and presented to you a survey of smokers showing that
16 X percent of the smoking public had been misled by
17 the conduct of the defendants in this case. No
18 official from the Minnesota Department of Health came
19 in here and said, despite all our efforts to educate
20 the people of Minnesota about the health risks of
21 smoking, there are a substantial number of
22 Minnesotans who still don't appreciate the magnitude
23 of the risks. To the contrary, in a Minnesota
24 Department of Health newsletter in 1984, the
25 Minnesota Department of Health told health-care

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1 officials, "Unfortunately, the public may be near the
2 saturation point" with respect to health messages and
3 the health consequences of smoking. That's the
4 evidence that came out of the files of the Minnesota
5 Department of Health.

6 No one from Blue Cross Blue Shield came in here
7 and testified that despite our best efforts to
8 educate our insureds about the health risks of
9 smoking, significant numbers of them are continuing
10 to smoke despite the information we're giving them
11 and that they're receiving from the public health
12 community. No one gave that kind of testimony.

13 You remember Mr. Gill, when he was
14 cross-examining Professor Scheffman, the defendants'
15 antitrust expert, and he indignantly asked Professor
16 Scheffman whether you have done any research as to
17 what the reaction was to the messages of smoking and
18 health? Now the fact of the matter is Professor
19 Scheffman said, "I absolutely have done that, yes."
20 Mr. Gill went on and said, "You haven't done any
21 research, at least not that we've seen in this case,
22 Professor Scheffman, that deals with the reaction of
23 individuals to the messages about smoking and health,
24 whether they were pro-tobacco or anti-tobacco."
25 Professor Scheffman said, again, that he absolutely

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1 had, and he talked about that evidence in his
2 testimony. But the point I want to make is that Mr.
3 Gill was indignantly asking Professor Scheffman
4 whether he had done any research that showed that
5 people had or hadn't been misled. It wasn't the

6 defendants' burden to prove that in order to recover
7 1.77 billion dollars in damages, it was the
8 plaintiffs' burden to do that kind of research, and
9 they didn't, and they didn't present any to you in
10 this courtroom.

11 The plaintiffs didn't show any projections, any
12 statistics, any data showing that 50 percent, five
13 percent, or one-half of one percent of the smoking
14 population was lulled into a sense of security, was
15 reassured, or was misled about the risks of smoking
16 or about the magnitude of the risks of smoking. The
17 only evidence that they offered on this issue at all
18 were broad, subjective conclusions that some people
19 don't seem to have a full appreciation.

20 Remember the Federal Trade Commission staff
21 report that the plaintiffs talked to you about --
22 this is the kind of evidence they offered -- where
23 the staff of the Federal Trade Commission
24 acknowledged that most Americans are generally aware
25 that smoking is hazardous but some do not fully

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1 appreciate the risks of smoking? Well that's not
2 evidence supporting a conclusion that the defendants
3 in this case should pay 1.77 billion dollars to the
4 plaintiffs. That's not evidence that significant
5 numbers of consumers were misled about the health
6 risks of smoking, especially in the face of the
7 contrary evidence that you did see during the course
8 of this trial.

9 When you go into the jury room, I'm going to ask
10 you to ask yourselves, when you begin to deliberate
11 on this issue: Why didn't the plaintiffs present any
12 such evidence? Why didn't they do any surveys or
13 research to establish that 50 percent or five percent
14 or one-half of one percent of the population was
15 actually misled? And I suggest to you that they
16 probably understood that the evidence would not come
17 out the way they wanted it to, and the reason is
18 because the message that was being communicated to
19 the public and received by the public about the
20 health risks of smoking was overwhelmingly adverse,
21 starting in 1953 when the first of the
22 epidemiological and toxicological studies began to be
23 reported in the press.

24 Now, let's take a look at some of the evidence
25 that was introduced and shown to you during the

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1 course of this case. Some of it was introduced by
2 us, some of it was introduced by the plaintiffs.
3 Let's talk about what evidence you did see and hear
4 in this case about the messages that were being
5 conveyed to consumers starting in 1953 and what
6 effect it had.

7 Remember Mr. Ciresi showing Professor Berman of
8 the University of Minnesota a Minnesota Poll in 1954
9 that showed that 24 percent of the people believed
10 that smoking was -- caused lung cancer. In 1954,

11 just as the very first of these surveys were coming
12 out -- I mean the first of these epidemiological and
13 toxicological studies were coming out and being
14 reported in the press, 24 percent already believed
15 smoking caused lung cancer. And remember what
16 Professor Berman said was the level of belief about
17 the health hazards of smoking a few years later after
18 the 1964 Surgeon General's report? The same data was
19 reported by The Minnesota Plan in 1984. That number
20 had gone from 24 percent to 95 percent. Ninety-five
21 percent, which Professor Berman testified in polling
22 data is literally universal belief.

23 Now let's talk about what effect this had. Do
24 you remember Professor Scheffman showing you a graph
25 that he had prepared? That graph was based on a

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1 graph that had been prepared by the staff of the
2 Federal Trade Commission in 1979. See the little
3 yellow there? That graph shows what was happening to
4 cigarette sales when the 19 -- early 1950s
5 epidemiological and toxicological studies came out.
6 Look what happened to cigarette sales in 1953 and
7 1954 when this information was reported to the
8 public: an immediate and precipitous drop in sales
9 occurred right then and there. And this is 1953,
10 ladies and gentlemen. This isn't after the Surgeon
11 General's reporter -- report. In 1953 there was a
12 legitimate and genuine controversy about whether
13 cigarette smoking did or did not cause disease.
14 Scientists were debating it in the press, at
15 conferences. Nevertheless, in one year you had a
16 huge drop in sales in 1953.

17 The medical and scientific communities would not
18 reach a consensus that cigarette smoking actually
19 caused lung cancer until 11 years later, in 1964, and
20 look what happened -- has happened to cigarette sales
21 since then.

22 All of this information was being communicated
23 to the public. It was reported in the Surgeon
24 General's reports. The 1979 Surgeon General report
25 said that "In the early 1950s, more than a dozen

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1 retrospective studies were published which first
2 generally alerted the medical and scientific
3 community to the health hazards associated with
4 cigarette smoking. The public was informed of these
5 studies and as a consequence there was a significant,
6 but brief, dip in the per capital consumption of
7 cigarettes."

8 Remember all of the newspaper headlines that
9 Professor Berman showed you reporting these studies
10 in the press? Remember the newspaper articles and
11 headlines that Professor Berman showed you after the
12 1964 Surgeon General's report? This stuff was being
13 conveyed to the public in many, many ways, and it has
14 had an irreversible effect on the perception of
15 people in this country about smoking and health.

16 Thirty-eight million people have quit smoking,
17 according to the Surgeon General's report in 1979.
18 The Minnesota Department of Health reported 32
19 million people had quit years before that. The
20 Surgeon General in 1989 said -- having trouble with
21 my exhibit -- the prevalence of smoking among adults
22 decreased from 40 percent in 1965 to 29 percent in
23 1987. Nearly half of all living adults who ever
24 smoked have quit. The Surgeon General went on to say
25 in that same Surgeon General's report, "Twenty-five

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1 years have elapsed since publication of the landmark
2 report of the Surgeon General's Advisory Committee on
3 Smoking and Health. By any measure, these 25 years
4 have witnessed dramatic changes in attitudes toward
5 and use of tobacco in the United States. The health
6 consequences of tobacco use will be with us for many
7 years, but those consequences have been greatly
8 reduced by the social revolution that has occurred
9 during this period with regard to smoking."

10 It can hardly be disputed that the overwhelming
11 majority of the American people, if not all of them,
12 believe that cigarette smoking is bad for you, that
13 it kills, and it has been the belief of the
14 overwhelming majority of the American people and
15 Minnesotans for a long, long time. Even with
16 children, the 1979 Surgeon General's report said that
17 "By the time they reach the seventh grade, the vast
18 majority of children believe smoking is dangerous to
19 one's health."

20 There have been 24 Surgeon General's reports
21 since 1964. Every single one of them has conveyed
22 nothing but negative messages about smoking and
23 health. Every single one of them has been reported
24 widely in the press, in the media, on television and
25 the radios. All bad. Nothing equivocal about them.

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1 No hedging. Smoking kills. Smoking -- smoking
2 shortens life.

3 Just look at some of the conclusions from some
4 of the Surgeon General's reports, all of which you
5 can look at when you go into the jury room to
6 deliberate. The 1964 Surgeon General's report said
7 "Cigarette smoking contributes to mortality and the
8 overall death rate." The 1967 Surgeon General's
9 report said "Smokers die younger." The 1968 Surgeon
10 General's report said it takes an average of eight
11 years off of your life; even light smoking, that
12 Surgeon General's report said, takes an average of
13 four years off your life. The 1979 Surgeon General's
14 report described smoking as slow-motion suicide.
15 There was no equivocation in the message that was
16 being conveyed to the American people. The message
17 being conveyed to the American people was smoking
18 kills.

19 Over the years the Surgeon General's reports
20 added diseases to the list of diseases it attributed

21 to smoking. In 1980 the Surgeon General's report
22 focused on smoking and women. In 1983 cardiovascular
23 or heart disease was added to the list of diseases.
24 In 1984 chronic obstructive pulmonary disease or
25 emphysema was added to the list. Every one of them

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1 widely publicized, everyone was being told, everyone
2 believed that smoking is bad for you and kills.
3 Just look around you, look around you today.
4 Most of our parents smoked. They smoked in their
5 cars, they smoked in their homes, they smoked in
6 restaurants. What do smokers do today? They're out-
7 casts. They have to sneak outside buildings to smoke
8 cigarettes. Most of the buildings in most large
9 cities are non-smoking. There has been a complete
10 social resolution -- revolution with respect to
11 smoking, and it's all because it is generally and
12 widely and universally perceived that cigarette
13 smoking is bad for you and kills.

14 For 32 years every pack of cigarettes sold in
15 the United States has carried a health warning.
16 Every pack of cigarettes. That health warning has
17 been changed and for the last several years it has
18 said the cigarette -- the Surgeon General has
19 determined that cigarette smoking is hazardous to
20 your health, and for the last 14 years the warning
21 has told you about different diseases and that it
22 causes death. Can you sit here today, ladies and
23 gentlemen, and think of any other product in your
24 common and human experience about which there has
25 been more volume and variety of health messages

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1 communicated to the public more often, more
2 frequently, and by more public health and educational
3 authorities than smoking? Has this been, on the
4 record of this case, this effort by the public health
5 community, by the scientific and medical -- medical
6 community, been affected by the tobacco companies'
7 efforts to reassure the public by statements by the
8 tobacco companies that more research is needed, it
9 isn't proved yet? Can, on the record of this case,
10 you honestly conclude that the few instances in which
11 the tobacco company has added to the tag-end of a
12 major anti-smoking article "more research is needed,"
13 that those articles have made a significant number of
14 people take up smoking who would not otherwise take
15 up smoking, or make a significant number of people
16 keep smoking who would otherwise have quit?

17 Remember, the issue that you have to decide when
18 you're going in there to determine whether or not to
19 award 1.77 billion dollars in damages to the
20 plaintiffs is have the plaintiffs proven that there
21 was actually a substantial increase in their
22 health-care costs attributable to these efforts by
23 the tobacco company to reassure the public? And this
24 is especially so here in Minnesota, ladies and
25 gentlemen, where the state has been so active for so

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1 long in educating people about the health risks of
2 smoking.

3 Now you'll remember when I said that there were
4 two issues that the defendants believe you have to
5 decide in order to determine whether or not the
6 plaintiffs should recover any damages. The first was
7 whether or not the acts, the efforts, the allegedly
8 misleading or allegedly reassuring statements by the
9 tobacco companies actually caused increased
10 health-care costs. The second was whether or not the
11 defendants actually could have placed safer products
12 in the market in time to have an impact on
13 health-care costs. This is the heart of what the
14 plaintiffs describe as their antitrust conspiracy,
15 it's what Professor Jaffe, the plaintiffs' antitrust
16 expert, testified about, and it was the subject of
17 the testimony of the defendants' antitrust expert,
18 Professor Scheffman. Remember this: Professor Jaffe
19 admitted on cross-examination that in order to know
20 whether or not there could have been any material,
21 significant, substantial, important impact on
22 competition, you'd have to know the answer to several
23 questions. Remember those? I'm going to write them
24 up here for you again. Whether a significantly safer
25 cigarette could have been produced by one or more of

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1 the defendants. Whether or not such a cigarette
2 would be acceptable to substantial numbers of
3 consumers. Whether or not the defendants would be
4 able to advertise the fact that these cigarettes were
5 safer and significantly safer. And finally, whether
6 these products could have been introduced in time to
7 have any significant impact on the plaintiffs'
8 health-care costs.

9 Remember, the plaintiffs are seeking damages
10 going back to 1978. What both Professor Jaffe and
11 Professor Scheffman told us was that these
12 significantly safer cigarettes that were acceptable
13 to consumers and about which the defendants could
14 have advertised the safety features would have had to
15 be developed and on the market years and years ago in
16 order for there to be any substantial impact on the
17 plaintiffs' health -- health-care costs. The
18 plaintiffs offered no evidence to satisfy any one of
19 those four preconditions to their recovery of damages
20 under this theory in this case, and, on the contrary,
21 considerable evidence was introduced showing that the
22 defendants did in fact try to develop, market, and
23 promote potentially safer cigarettes, and that they
24 devoted enormous resources to them.

25 Now I'm only going to say a moment -- a word or

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1 two about low tar and nicotine cigarettes because the

2 plaintiffs have pooh-poohed low tar and nicotine
3 cigarettes from the beginning of this case. And
4 there may be a debate, a controversy, about whether
5 low tar and nicotine cigarettes are or are not safer.
6 There certainly is some substantial evidence that
7 they were, at least with respect to lung cancer. But
8 the fact of the matter is that the public health
9 community unequivocally called for the development
10 and sale of low tar and nicotine cigarettes for many,
11 many years, and the tobacco industry responded to it.

12 Remember Dr. Ernst Wynder? Dr. Ernst Wynder was
13 one of the scientists who developed the very first
14 epidemiological and toxicological studies back in the
15 1950s that led to the precipitous decline in
16 cigarette sales, that led to the Frank Statement,
17 that led to a change in the way the American people
18 and the American public health community thinks about
19 smoking. He was one of the pioneers in this area.
20 And Dr. Wynder expressed publicly and openly that the
21 tobacco companies should develop low tar and nicotine
22 cigarettes. He expressed the opinion that "A
23 reduction in the tar and nicotine content level of
24 cigarettes as animal experience -- experiments as
25 well as the human statistical studies show will be

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1 followed by a significant reduction in cancer risk.
2 That was Professor -- Dr. Wynder, who subsequently
3 worked with Lorillard, you'll hear about that from
4 Mr. Monica, in their efforts to develop safer
5 cigarettes.

6 The Public Health Service of the United States
7 also called for the development of low tar and
8 nicotine cigarettes. This is from the 1979 Surgeon
9 General's report, referring to calls by the Public
10 Health Service back in the '60s. "This was
11 encouraged by a series of government actions
12 beginning in 1966. In that year, the Public Health
13 Service issued its finding that 'the preponderance of
14 scientific evidence strongly suggests that the lower
15 tar and nicotine content of a cigarette, the less
16 harmful (will) be the effect."

17 Now the plaintiffs can come in here and try to
18 show you evidence that today in 1998 it's not so
19 clear whether low tar and nicotine cigarettes are
20 safer, although there is evidence that they are and
21 were. Do you remember Dr. Samet admit -- admitted
22 there was a reduction in lung cancer rates? But it
23 was responsible, it was responsible conduct for the
24 tobacco company to introduce these products. But
25 they didn't stop there, my point is they didn't stop

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1 there. You heard evidence about the effort by
2 Liggett to develop a palladium cigarette. The
3 problem was the palladium cigarette didn't satisfy
4 test number one. Remember Professor Jaffe
5 acknowledged that when you add nitrates to cigarette
6 smoke -- to -- to tobacco, which is what the

7 palladium product did, nitrates translate into
8 nitrosamines which are themselves carcinogens. And
9 there was no evidence whatsoever that any public
10 health authority or scientific authority in the
11 United States supported the palladium cigarette.
12 Premier, there's lots of evidence about Premier in
13 this case and the extent to which the public health
14 community attacked Premier as not being safer. You
15 heard evidence about Philip Morris's Delta 1 and
16 Delta 2 product -- projects -- products, which, like
17 Premier, heated rather than burned tobacco smoke.
18 They couldn't make it work. You heard evidence about
19 AIRBUS by B.A.T, which also had problems making the
20 product work; they had trouble keeping it lit.
21 Denic, a cigarette with no nicotine or virtually no
22 nicotine, hundreds of millions of dollars spent by
23 Philip Morris to develop a denicotinized product; the
24 public health community attacked it.

25 There is no evidence on the record of this case
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1 that the cigarette companies today can develop a
2 significantly safer cigarette, let alone that they
3 can develop one that would be acceptable to
4 consumers. All of the evidence that you heard in
5 this case about the efforts that the tobacco
6 companies made to actually market their potentially
7 safer cigarettes failed because consumers wouldn't
8 accept them. Premier tasted and smelled bad. Denic,
9 Philip Morris's, tasted and smelled bad. There is no
10 evidence on the record of this case that the
11 defendant cigarette companies could have developed a
12 significantly safer cigarette than the ones that they
13 did that would be acceptable to consumers, and there
14 most assuredly is no evidence whatsoever that these
15 defendants would have been able successfully to
16 advertise the health benefits of any of those
17 cigarettes.

18 You heard Professor Scheffman testify in detail
19 about how difficult it has been for the defendants to
20 make any claims of any kind about their products and
21 how the Federal Trade Commission has required
22 ironclad proof done by independent people, not by the
23 tobacco companies, but by independent people
24 supporting any health claims that could be made.

25 And finally, and perhaps most importantly, when
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1 we're talking about the 1.77 billion dollars in
2 damages the plaintiffs want you to award them, there
3 is utterly no evidence that any such products could
4 have been developed in sufficient time, years ago, to
5 have had any material impact on the health-care costs
6 that have been incurred by the plaintiffs in
7 Medicaid, in GAMC, and Blue Cross insurance.

8 Now, the last point that I would like to make is
9 that there not only is no evidence upon which you
10 could conclude that the -- something about the way
11 the defendants made and sold cigarettes cost the

12 plaintiffs the money they claim in this case, there
13 not only is no evidence upon which you could conclude
14 that the defendants could have made a significantly
15 safer cigarette, acceptable to consumers, that could
16 have been successfully advertised in time to have any
17 material impact on the plaintiffs' health-care costs,
18 there is no evidence in this case upon which you
19 could conclude that smokers cost more than
20 non-smokers on Medicaid appear GAMC. Remember when I
21 said that, back in my opening statement, that the
22 very evidence upon which the plaintiffs would rely
23 would not establish that smokers cost more than
24 non-smokers in Medicaid and GAMC? Remember, that's
25 what the state's damage claim is. It isn't

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1 health-care costs in general, it's the health-care
2 costs incurred by the state of Minnesota in Medicaid
3 and GAMC, two very specific health-care programs.
4 And they didn't prove it because the data upon which
5 they based their calculations were not data for that
6 kind of people.

7 Remember just a week ago Dr. Wecker testified
8 about what he found when he used data for such
9 people, for people on Medicaid and GAMC? The
10 calculations that he made before you in this
11 courtroom were based upon the same national data that
12 the plaintiffs used in their damage calculations,
13 except that instead of using the general population,
14 including all the healthy people in the world, he
15 based his calculations on a subset of that same data
16 of people on public aid programs like Medicaid and
17 GAMC. And what did he find? He found that in the
18 relevant population, those people who were on public
19 medical aid programs, he found that non-smokers
20 cost -- that smokers cost 10 percent less than
21 non-smokers.

22 Now what does that mean? What that means --
23 what does 10 percent less for smokers than
24 non-smokers mean? It means that for every 11 dollars
25 spent on a non-smoker, 10 dollars was spent on a

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1 smoker. Smokers don't cost more than non-smokers in
2 Medicaid and GAMC.

3 Now Dr. Wecker analyzed this issue several
4 different ways to be sure that what he was going to
5 present to you in this courtroom was accurate. He
6 reran the plaintiffs' so-called core model that
7 included all diseases and he got the same result. He
8 reran a version of the plaintiffs' so-called
9 diminished health model, but he used people receiving
10 public aid like Medicaid and GAMC. Same result,
11 smokers didn't cost more than non-smokers. He
12 compared the hospital visits of smokers versus
13 non-smokers, and this is what he found: non-smokers
14 had more hospital visits than smokers. He compared
15 doctors' visits; non-smokers had more doctors' visits
16 than smokers.

17 Dr. Wecker did nine different analyses of the
18 public aid population, and he got the same result
19 every single time. The state did not spend more
20 money in Medicaid and GAMC on smokers than it spent
21 on non-smokers.

22 Now this may come as a surprise to some of you.
23 You may ask yourselves: How is it possible that
24 smokers cost the state less than non-smokers?
25 Doesn't smoking cause disease? Don't smokers cost

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1 more than non-smokers? Well remember Dr. Wecker
2 presented you with data that showed that, in general,
3 smokers do cost more than non-smokers when you look
4 at the general population, just what you might
5 expect. But that's not the issue in this case.
6 Medicaid and GAMC populations are different from the
7 general population. That's a fact, that's an
8 indisputable fact. They're special. Recall the
9 testimony of Dr. Samet, the plaintiffs'
10 epidemiologist? On cross-examination Dr. Samet
11 admitted that Medicaid is a special population. He
12 admitted that GAMC, the state's own program, is also
13 a special population, and he admitted that you get
14 unexpected results when you look at special
15 populations. And that's what Dr. Wecker found. He
16 didn't just show you that in the public aid
17 population smokers don't cost more than non-smokers,
18 ladies and gentlemen, he explained to you why this
19 was so. He testified that people in the public
20 population in general have different characteristics
21 from people in the general population. That's hardly
22 debatable. They have more accidents, they have more
23 medical expenses, they have more circulatory
24 problems, they have more drug abuse and alcoholism,
25 mental health and illnesses. They have problems the

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1 general population doesn't have. The fact of the
2 matter is that when you're dealing with a special
3 high-risk population, you can't predict what the
4 result will be by using data for the population of
5 the U.S. or even Minnesota at large. Adding smoking
6 to the mix of factors doesn't make much of a
7 difference. That's what the data show.

8 Plaintiffs would like you to ignore the fact
9 that the Medicaid and GAMC populations are special,
10 even according to their own expert, Dr. Samet. Mr.
11 Weber will have more to say about this in his closing
12 as well, but the fact is that on the evidence that
13 was presented to you in this case, if you consider
14 people on GAMC and Medicaid, the state has not spent
15 any more money for smokers than non-smokers, and
16 therefore, nothing that the defendants did that was
17 wrongful or unlawful cost the state money.

18 The bottom line of all of this, I guess, ladies
19 and gentlemen, is that when you go into the jury room
20 and you consider all the issues before you, you're
21 going to reach the point where you have to decide:

22 Are the plaintiffs entitled to recover any
23 compensatory damages, let alone the 1.77 billion that
24 they ask for? It's true enough you're being asked to
25 judge the conduct of the defendants in this case as
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1 well, but ultimately you're going to be asked to
2 decide whether or not the plaintiffs have sustained
3 their burden of proving that this conduct, assuming
4 it was wrongful, cost the state money, increased the
5 state's health-care costs in Medicaid and GAMC and
6 increased Blue Cross's insurance costs. And it is
7 only if you find that the answers to those questions
8 is affirmative that you should return a verdict of
9 any damages at all for the plaintiffs in this case.
10 And the fact of the matter is -- the fact that it is
11 your state government and a non-profit corporation,
12 which understandably you respect, does not change the
13 fact that they are plaintiffs in this case, seeking
14 to use the judicial system and the legal system of
15 our country with the same burden of proof that any
16 plaintiff who walks into this courtroom has, which is
17 to prove by a -- by the greater weight of the
18 evidence that the defendants' wrongful conduct cost
19 them money, and how much, and they have not sustained
20 that burden of proof.

21 Thank you very much.

22 THE COURT: Ladies and gentlemen, we're
23 going to take a short recess. By that I mean it is
24 10:16 on my clock, and we will take a recess for 10
25 minutes. Not 15, but 10 minutes.

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1 THE CLERK: Court stands in recess.
2 (Recess taken.)
3 THE CLERK: All rise. Court is again in
4 session.
5 (Jury enters the courtroom.)
6 THE CLERK: Please be seated.
7 THE COURT: Counsel.
8 MR. BERNICK: Good morning, Your Honor.
9 Good morning, ladies and gentlemen.
10 (Collective "Good morning.")
11 MR. BERNICK: At the beginning of the case
12 I gave you a road map to use in thinking about the
13 evidence that was going to come in about the history
14 of this industry, a road map, and I've tried to put
15 down the basic elements of that road map here again
16 today. Remember, we talked about whether the
17 industry responded to the smoking-and-health
18 controversy with research, we talked about whether
19 the industry responded to the smoking-and-health
20 controversy as concerns product design, and we talked
21 about defending smoking as another aspect of
22 responding to the controversy. I've put the same
23 items on the table this morning, and we're going to
24 review how the evidence has now come in on exactly
25 those same items. But I've also expanded the chart.

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1 You can see I've got three columns. And the reason
2 for doing this is not only to talk about the
3 evidence, but to talk about the claims that are being
4 made, the instructions that you have been given, and
5 the verdict form that you're going to have to fill
6 out.

7 The first column is what actually was done, and
8 I've got a little parenthesis, Frank -- FS for Frank
9 Statement. In each case I'm going to talk about what
10 the Frank Statement said, and that will bear directly
11 upon one of the claims in the case. Indeed, the
12 first question that you're going to have to fill out
13 relates to a special duty or a special undertaking.
14 So keep track of this column. This is going to be
15 the special duty column, and it pertains to that
16 question on the form. The second column says "Effect
17 on the Market," market effects. And above it it says
18 "Antitrust Claim," because this relates to the
19 antitrust claim in the case. And there's going to be
20 a separate space in the verdict form that you'll fill
21 out for antitrust. And the final column is the
22 "Consumer" column, up above it it says "Consumer
23 Fraud Statute." There are a series of statutory
24 claims relating to deceptive trade practice claims,
25 basically, and in that respect I'm going to talk to

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1 you about the consumer and representations made to
2 the consumer when we get to that column. So that's
3 how I've organized this table, and I'm going to do my
4 best to get through the table this morning and fill
5 it out for you.

6 To give you a little bit of a preview, I'm also
7 going to go down to the bottom line. What is the
8 bottom line on the Frank Statement? Will we stand
9 behind the Frank Statement? What will we say about
10 whether we met the commitments that were made in the
11 Frank Statement? And I will demonstrate to you what
12 I believe the bottom line is, which is that when it
13 came to the Frank Statement, we accomplished the
14 basic scientific goals that were set out. I believe
15 we'll be able to demonstrate that.

16 There were problems. We're going to step up on
17 the problems. But we're going to talk about what was
18 the core of the commitment that was made, what was
19 the basic goal that had to be achieved, and did we
20 get there.

21 What about the effect on the marketplace, what
22 are we going to say about that at the end of the day?
23 There's already been discussion by Mr. Bleakley.
24 What we're going to say is that the ultimate test of
25 an antitrust claim and the ultimate test of whether a

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1 market is competitive is how the companies
2 interrelate with themselves and how they fare. And

3 the unequivocal basic fact of this industry is the
4 people who populate this industry, they prey on one
5 another. They are all over each other. That's the
6 bottom line. And I represent a client who did not
7 fare particularly well and that's -- we got cut down.
8 Maybe now you know why they picked such a short
9 lawyer to represent them. Over all the years we got
10 worn down, and that is the ultimate litmus test of
11 competition. Is this a cozy industry where everybody
12 gets along and they all make money and they're all
13 doing all right, or are we crawling all over each
14 other for market share? This is a market-share game,
15 it's a market-share industry. Some people did real,
16 real well, some people did not so well at all, and
17 I'll talk to you about that.

18 The consumer story and the consumer bottom line,
19 let me put a question mark because it comes at the
20 end, but we'll get to that as well.

21 Let's begin by talking about the commitments
22 that were made in the Frank Statement concerning
23 research. Put the Frank Statement up here for you to
24 look at. And I'm going to highlight this portion
25 right here and blow it up. There are very specific

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1 commitments that were made in the Frank Statement as
2 concerns research. It says, "We are pledging aid and
3 assistance to the research effort into all phases of
4 tobacco use and health. This joint financial aid
5 will of course be in addition to what is already
6 being contributed by individual companies." Remember
7 at the time American Tobacco, which was then an
8 industry leader, one of the principal architects of
9 these commitments and this whole process, was already
10 funding research at the Medical College of Virginia
11 on its own.

12 Number two, "For this purpose we are
13 establishing a joint industry group consisting
14 initially of the undersigned. This group will be
15 known as the Tobacco Industry Research Committee."
16 And here comes the key: "In charge of the research
17 activities of the Committee will be a scientist of
18 unimpeachable integrity and national repute. In
19 addition there will be an Advisory Board of
20 scientists disinterested in the cigarette industry.
21 A group of distinguished men of medicine -- from
22 medicine, science, and education will be invited to
23 serve on this board. Those scientists will advise
24 the Committee on its research activities." Those
25 were the specific commitments that were made.

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1 Now there's been a lot of talk in this case
2 about how this Frank Statement received such wide
3 publicity. Everybody was able to take a look at the
4 Frank Statement. But you have to ask yourself:
5 Where was the evidence of somebody who actually said
6 I read it? I saw it? Well there's one person who
7 saw it, and his remarks on his issue are in evidence.

8 There's a fellow from the Department of Justice,
9 Stanley Barnes, Assistant Attorney General, and what
10 does he say? He said, "I read with interest the
11 statement of the Tobacco Industry Research Committee,
12 which appeared in the newspapers on January 4,
13 regarding the Committee's pledge of aid and
14 assistance to the research effort into all phases of
15 tobacco and health. I would appreciate receiving as
16 many details as the Committee's plan -- of the
17 Committee's plans as you may care to disclose at this
18 time."

19 Now why is the Department of Justice interested
20 in this effort, in this joint effort? Because it's
21 an agreement among competitors to engage in a joint
22 activity. And of all the people who saw this
23 advertisement and of all the people who saw the Frank
24 Statement, he's right there. He wants to know what
25 the story is. And the evidence reflects that in

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1 response to his letter there was a very formal and
2 very prompt answer. A letter is written a little
3 while later to Mr. Barnes, and attached to the letter
4 is a statement, a very formal statement of what the
5 purpose of the CTR program -- the TIRC program was to
6 be. It's all spelled out. "The purposes and
7 objectives of the Committee are to aid and assist
8 research into tobacco use and health, and
9 particularly into the alleged relationship," the
10 alleged relationship, "between the use of tobacco and
11 lung cancer, and to make available to the public
12 factual information on this subject. It is the
13 considered judgment of the Committee that its
14 activities shall be confined to the purposes set
15 forth above, and that it nowise be considered or to
16 operate as a trade association," and it goes on.

17 What's happening here? What is the key
18 statement that's being made and what does that have
19 to do with the commitment that was made in 1954 and
20 with the antitrust claims in this case? An important
21 distinction was being made between different kinds of
22 smoking-and-health research. We have
23 smoking-and-health research that is related to the
24 smoking-and-health issue, the alleged relationship,
25 causation, and we have a separate issue which is

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1 commercial research, research relating to products.
2 Very important distinction. And a very formal
3 statement is made at this time that this is what the
4 CTR or TIRC is going to focus on, and they are not
5 going to get in there, into commercial research. And
6 who is looking over their shoulder? It's the
7 Department of Justice. And what is the commitment
8 that was made? "To this end the Committee is
9 proceeding under the advice of legal counsel selected
10 from among the counsel or nominees of its members."
11 Very important to have the lawyers there making sure
12 that there's not an antitrust issue. Day one, at the

13 very beginning of the Frank Statement, this structure
14 has been set up to make these distinctions. This
15 structure has been set up requiring some supervision
16 and involvement of lawyers.

17 Now you're familiar with the structure that
18 ultimately got put in place. This is one of the
19 state's exhibits. It is a basic diagram. I want to
20 talk about this a little bit here because it's very
21 instructive. Again, remember the lawyers are going
22 to be involved, and in fact there is a general
23 counsel committee that is involved in the structure
24 for the operation of CTR. There's also an
25 administrative structure, there's a president and a

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1 scientific director, and then there is an important
2 distinction that's made in the organization itself
3 between independent research section on the one hand
4 and industry special projects section on the other.
5 And it is under this left-hand portion, the
6 independent section, that there appears the
7 Scientific Advisory Board, which became the
8 independent group of scientists that were promised by
9 way of giving advice on the kinds -- or advise the
10 committee on its research activities. That was the
11 SAB. And they were formed under the independent
12 section of this organization. Was the whole
13 organization, was all of CTR independent? Absolutely
14 not. This was an industry association. It was
15 created and funded by the industry. There was never
16 a representation made that the organization itself
17 would be independent of the industry. Did our
18 counsel's committee have a relationship with people
19 who populated the organization, were ultimately paid
20 by the industry? The independence was lodged in the
21 fact that a Scientific Advisory Board would be
22 created to advise the committee on research
23 activities. That was the commitment that was made in
24 the Frank Statement.

25 Now we all know the history now. We've heard it

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1 through Mr. Glenn and you've heard it through others
2 of the kind of research that got done through the
3 grant program, contracts and grants, on the advice
4 and recommendation of the SAB. You've heard of
5 thousands of studies that were completed and
6 published in peer-reviewed journals. You've heard of
7 how prestigious the research organizations were who
8 conducted that research. You've heard that no less
9 than three different Nobel laureates were numbered
10 among the grantees of the CTR program. You've heard
11 the Surgeon General of the United States has cited
12 CTR-funded grant studies over 300 times during the
13 course of the years. This is a major, extensive
14 scientific effort, all published in peer-reviewed
15 journals, relied upon by the Surgeon General of the
16 United States. Those facts are undisputed in this
17 case, completely undisputed in this case, those basic

18 committed facts of the Frank Statement.

19 What are the attacks that have been made on the
20 SAB and on the CTR effort? There are attacks that go
21 to the motives that the industry had in forming CTR
22 to begin with. You heard those attacks. Indeed,
23 they are based upon observations that are made in our
24 own documents. We have observations that were made
25 here in 1978. "Attached is a statement by Bill Shinn

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1 concerning the value of Council for Tobacco Research.
2 Bill mentions two aspects of particular value in
3 contract (1) the direct legal protection derived by
4 Brown & Williamson and (2) the political and public
5 relations advantage accruing to the industry." There
6 are PR motives, there are legal motives. Are we
7 going to deny that? Absolutely not. There was a
8 clear PR motive. This research was critical to -- it
9 was critical to tell the public that this response
10 was being made. It was critical to tell the public
11 the quality of the scientists and the independence of
12 the scientists who were going to advise the committee
13 on research matters.

14 Is there a legal dimension? Of course there is.
15 If the -- if the companies are questioned from a
16 legal point of view about what's being done, of
17 course you're going to talk about CTR. What would
18 you expect to happen? The question, though, is: Did
19 those motives end up compromising the heart and soul
20 of the grant program? Do they end up compromising
21 the science that was done by that program?

22 There are criticisms that have been made now by
23 scientists who criticized the direction of the
24 program. How do we answer that? These aren't --
25 these aren't questions that are being raised about PR

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1 or legal, these are questions that are being raised
2 about the direction, the scientific direction. How
3 do we answer those types of claims? And yet we've
4 seen evidence of that. These are scientists from
5 within the companies themselves. Here's an example.
6 This is Dr. Wakeham, and you've heard this language
7 used. "It has been stated that CTR is a program to
8 find out 'the truth about smoking and health.' What
9 is the truth to one is false to another. CTR and the
10 industry have publicly and frequently denied what
11 others find as 'truth.' Let's face it. We are
12 interested in evidence which we believe denies the
13 allegation that cigarette smoking causes disease. If
14 the CTR program is aimed in this direction, it is in
15 effect trying to prove the negative, that cigarette
16 smoking does not cause disease. Both lawyers and
17 scientists will agree that this task is extremely
18 difficult, if not impossible."

19 Dr. Wakeham is saying, hey, what about the
20 direction of this research? Good question. How do
21 we answer that? Answer comes back down to the same
22 thing: If back in 1954 we left those types of

23 judgments up to Dr. Wakeham, a scientist for the
24 tobacco industry, and he decided to take a different
25 direction, how would the industry have fared in the
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1 process of justifying the direction of CTR? What if
2 somebody else other than Dr. Wakeham had said, gee, I
3 don't like the direction that you've pursued, you're
4 just a tobacco industry scientist, what would we have
5 done? That was the soul, that was the essence, that
6 was the merits of the decision to use the SAB. Dr.
7 Wakeham's got a complaint; the complaint is a
8 complaint about the SAB. They are the ones who are
9 making the recommendations. It is the SAB who was
10 advising on the direction of the research. Are
11 people critical of the SAB? Sure. The SAB focused
12 on basic research, understanding causation of cancer.
13 Other people wanted to see studies that were more
14 focused on cigarettes themselves. So they were
15 criticized. But it was their job to be there, to be
16 independent, to call it the way that it was. That's
17 why they were chosen to begin with.

18 Well now what about that lawyer involvement
19 stuff? Did the lawyers preclude the SAB from
20 performing their function? There are a whole series
21 of lawyer issues that have been raised, and there was
22 lawyer involvement in the affairs of CTR. It is not
23 going to be denied in this case. We never said that
24 it would be denied in this case.

25 Let's analyze it. First let's begin with the
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1 SAB. Did lawyers ever tell the SAB you can't do?
2 And the answer is there was a period of time when
3 that was true. I mentioned this in my opening. I
4 said there was an issue. The evidence has come in on
5 that issue, it's not been prominently featured, it's
6 come in in the form of documents, and I'm going to
7 talk to you about it right now. Remember, Dr. Glenn
8 said that didn't happen on his watch, but what had
9 happened earlier before Dr. Glenn got there? Well
10 analyses were done of the history of some of the
11 grant programs, and were done, in fact, by outside
12 counsel. Mr. Weber's firm in the mid-1980s took a
13 retrospective view, a very aggressive worst-case
14 retrospective view on what might be criticized about
15 the involvement of lawyers in the SAB. And the memo
16 is going to be before you, it's already in evidence.
17 The analysis was done. Mr. Weber will talk about
18 this as well. But they were looking back in time and
19 saying, worst case, if somebody wanted to criticize
20 us, what would they say? And they focused on a
21 particular period of grants being made pursuant to
22 the SAB's recommendation.

23 This particular memo focuses on log entries.
24 The log entries indicate whether a legal opinion was
25 deemed necessary by Mr. Hoyt. Several entries note
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1 that a proposal was sent to Mr. Jacob, who was a
2 lawyer for contract. "In the majority of cases in
3 which it appears that a legal opinion was obtained,
4 the proposal was eventually treated as a case.
5 However, other files were apparently held
6 indefinitely, not treated as a case, or a letter
7 discouraging formal application was sent," and it
8 goes on to list several proposals. And if you take a
9 look at the very first one here, this one right here,
10 this one right here, you'll see that there's no
11 indication in this particular one of legal advice
12 being provided. But if you bounce along to the next
13 one you'll see that this entry number two has "List
14 entry -- (hold - legal) -- discouraged." See that
15 one? And the question is, well, what's going on?
16 And if you turn over to the next page, you'll see
17 that there's some description -- if I can get it
18 up -- there was some description of what was going on
19 here. "Investigation of possible" -- I won't even
20 try that word" -- actions of nicotine. Study of the
21 effects of nicotine." You take a look at another
22 one, the next entry, "Log entry - legal opinion: No,
23 hold." And this is another one that deals with a
24 nicotinic agent. If you go down the rest of the page
25 you will see that there are a whole series of entries

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1 all relating to -- actually number four relates to
2 nicotine. Number five is a little bit different.
3 This one does not appear to relate to nicotine, and
4 the legal opinion is "Okay to send, yes, okay to
5 send." Apparently that one was not discouraged.
6 What's happening here? What is this concern
7 with nicotine and why are lawyers saying hold or
8 discourage? This is a situation that I wanted to
9 talk to you about. There is other evidence in the
10 record about what was happening, and I'll show you a
11 document that reflects the nature of the opinions
12 that were being given. This is a memo written in
13 April 1978, and we'll zoom in on the part that deals
14 with this issue. It says, "American has also
15 concluded that part of the central nervous
16 system/nicotine work poses a question with respect to
17 the assurances which the companies gave to the
18 Justice Department to the effect that none of the
19 scientific work at CTR would have commercial
20 application. Philip Morris and Lorillard concur in
21 the view that some of the central nervous system
22 (CNS) work has commercial overtones, specifically
23 work which would lead to blocking agents or
24 substitutes for nicotine."

25 What are we dealing with? We go back to the

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1 commitment that was made to the Department of Justice
2 in 1954 that the CTR work would focus on causation
3 and would avoid commercial applications, and the

4 issue that was being raised is whether certain work
5 on certain aspects of nicotine might have commercial
6 application and therefore would pose potential
7 antitrust issues. It's the issue that was being
8 raised, issue very consistent with the undertaking
9 that was made to the Department of Justice back in
10 1954.

11 Now was that good advice? Was it bad advice?
12 There's no evidence in the record that would enable
13 you to really ascertain it. No witness has taken the
14 stand who says that is a terrific antitrust analysis
15 or a poor antitrust analysis. It was conservative
16 advice. It was advice that said we have to be
17 worried about this, we should avoid it, we don't need
18 to get into it, and it was given and it was
19 followed. And in this particular respect -- or
20 during this period of time, the SAB was told it
21 couldn't pursue certain work, a significant
22 development, based upon this advice and other legal
23 advice that was provided regarding these issues
24 during this period of time.

25 There was fallout. This did not go down
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1 lightly. People wrote about whether this advice
2 compromised the independence of the SAB and the
3 independence of CTR. You will see other documents
4 that are now in evidence where lawyers and others who
5 are involved in committee meetings are now dealing
6 with the consequences. Here is one. "Yeaman says
7 that after the nicotine 'flap' the independence of
8 CTR is forever tainted."

9 "Shinn says -- Sommers says it would be
10 possible to turn CTR into a trade research group.
11 Known certain areas CTR cannot fund. Has affected
12 independence." People were not happy with this.
13 People thought that it affected the independence of
14 CTR. And at this point in CRT's history, the
15 industry in this review was close to saying there are
16 too many problems with trying to maintain the
17 independence of this effort while still satisfying
18 concerns that we have with antitrust issues and other
19 issues, too difficult to maintain the appearance of
20 complete independence, let's shut her down, let's
21 turn it into a trade association, let's forget about
22 the commitment that was made. And ultimately the
23 decision that came out of that process was no. By
24 1981 a report was made to the Executive Committee
25 that says we are going to maintain CTR in its current

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1 form. Let it go forward with the research, even
2 after this event had occurred.

3 What about special projects? You've heard about
4 special projects. Special projects really grew out
5 of this same organization. Let's go back to it for a
6 moment. If I can get it up here. Remember that
7 we've got this section here, there's a difference
8 between the independent research section and the SAB,

9 and the special projects section. Why was it
10 necessary to have special projects? Well a time
11 came, particularly after the 1964 Surgeon General's
12 report, where lawyers, who are concerned with where
13 the science was going in order to respond to
14 litigation and to regulation, wanted research done on
15 certain subjects. They wanted them looked at because
16 it was important. Science was driving the
17 smoking-and-health controversy, was driving
18 litigation and driving regulation. Lawyers are
19 retained to handle litigation or regulation; of
20 course they're going to get involved in the science
21 and they want science done. The very fact that there
22 was a separate section set up, this special project
23 section, is evidence of the independence of the SAB
24 grant program. They could not go -- these lawyers
25 couldn't go to the SAB and say, oh, guess what I

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1 would like? For litigation purposes would you please
2 fund this or would you please fund that. That was
3 inconsistent with the structure and commitments made
4 over here.

5 So if the lawyers wanted to get research done,
6 they had to go a different route, and the CTR was
7 used to provide the administrative organization for
8 research that was done for litigation and regulatory
9 purposes on the suggestion of lawyers. Separate
10 section, not represented as being approved by the
11 SAB.

12 Now this was not just back-of-the-envelope
13 research. This was research done on a very high
14 plane, published, done by prestigious organizations.
15 And you've seen and heard testimony relating to, as
16 an example, all of the other organizations that
17 funded these same special projects, American Cancer
18 Society, National Institutes of Health, Centers for
19 Disease Control. These were lawyer-initiated
20 projects, but they were pretty high-level
21 lawyer-initiated projects funded by other
22 organizations, pursued by prestigious research
23 organizations.

24 When it came down to acknowledgments of funding
25 sources, this is a letter to a special project

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1 recipient that says, "Our records will continue to
2 designate this undertaking as a special project of
3 The Council for Tobacco Research rather than a
4 grant-in-aid. If a credit line should be inserted
5 into any future publications it should be so worded."
6 The idea being keep it separate, don't make the
7 representation that it is being approved as part of
8 the grant program.

9 But the story is not over. We have the grant
10 program, we have special projects, but we also have
11 other research activities involving scientists.
12 Again, go back to our chart. We have the grant
13 program on one side, we have the special projects on

14 the other.

15 This last category is called law firm account
16 activities. And you know what? You don't find it on
17 this organizational chart at all because it wasn't
18 done through CTR. The special account work, the work
19 done through law firms for witnesses who had
20 consulting relationships, was purely for litigation
21 purposes and it wasn't done necessarily with the
22 anticipation of being original research.

23 You have seen expert after expert take the stand
24 and testify. Dr. Channing Robertson, he's retained
25 as an expert, he does an analysis, he comes in and

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1 sits down and testifies, and he gets paid. Now he
2 gets paid by somebody, presumably Mr. Ciresi's
3 client. And it may be that the funds to be paid come
4 through Mr. Ciresi's firm or come directly from the
5 state. In many cases law firms retain witnesses to
6 do expert consulting work as witnesses. Law firm
7 account work, special account work, because the
8 industry was involved in litigation.

9 Now by the time I'm done talking here, hey, you
10 got grants going over here and special projects going
11 over here and lawyers are around here with witnesses
12 over here some place. It's a complicated process.
13 And it's unquestionably true that problems and
14 questions arose during the administration of this
15 organization and structure. Questions arose. We're
16 not going to gloss over and tell you that it was all
17 just perfect and everything was hunky-dory. There
18 were problems. Questions were raised.

19 I'll give you a couple examples, things that are
20 in evidence that you may review, not necessarily have
21 been the subject of a lot of testimony. This is a
22 letter, letter written in 1992, and what this letter
23 discusses is a moratorium that's been placed on
24 special projects. 1992. "This is to share with you
25 our thinking and recommendation with respect to

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1 continuing for the time being the moratorium that
2 Lorillard is already observing with respect to new
3 funding of 'special projects.'" And it turns out
4 there's a grand jury inquiry into the issue, and the
5 nature of the grand jury inquiry is pursued on the
6 next page: Is there some potential fraud that's
7 involved in special projects? And the moratorium,
8 the author is clear in saying, "Our recommendation is
9 that the moratorium should be continued for the time
10 being. Let me quickly note that this is not because
11 we are of any view that special projects -- either as
12 administered via CTR or subsequently -- are criminal,
13 fraudulent or improper in any respect." They are
14 under review; therefore, there is a moratorium.
15 That's one example.

16 A few days later another memo is written where
17 somebody who works for the same lawyer says we've got
18 a situation where we have a special project

19 recipient, somebody who has gotten special project
20 funding, but he now wants money -- he now is in a
21 different situation and we're thinking of using him
22 as an expert. Can we fund him as an expert through
23 the law firm account, given the fact that he used to
24 be a special project recipient? That's a question
25 that gets raised. And the same lawyer says this, "In

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1 my overcautious view, the Jensen issue raises a
2 larger question -- whether 'CTR special projects'
3 funds (and, after such activities were moved out of
4 CTR, joint industry funds administered through Shook,
5 Hardy) were used to purchase favorable judicial or
6 legislative testimony, thereby perpetrating a fraud
7 on the public." Question raised that, well, if
8 you're going to be paying people that have gotten
9 special projects money to act as consultants or to
10 retain consultants, is there some kind of fraud
11 theory that can be developed? And there's follow-up
12 on the memo. And a few days later the situation is
13 analyzed and it becomes -- it is determined that if
14 the funds are given to this individual purely for
15 consulting purposes, purely as a witness, consultant,
16 or for litigation purposes, and are denominated
17 expressly as such, and not for a special project,
18 there is no problem. It says "Based upon these
19 representations -- and with the specific
20 understanding that the payment is a
21 consultancy/expert witness fee, will be expressly
22 denominated as such, and will be paid out of a fund
23 used for that purpose -- HMW," who was a senior
24 lawyer -- "and I told Allinder that we did not view
25 the proposed payment as a violation of Lorillard's

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1 moratorium on special industry research projects and
2 we so advised Art Stevens."

3 So we've got an administrative problem,
4 questions are being raised, it's a sensitive time and
5 a very difficult administrative problem, and that's
6 the way that it's worked out.

7 So this was a complicated structure. Each of
8 the elements alone as a grant program or separately
9 lawyers funding peer-reviewed research or separately
10 lawyers retaining expert witnesses, there's nothing
11 unusual about those. When you have the same
12 administrative organization and when you have SAB and
13 handling special projects, you've got to keep them
14 separate and you've got to provide for the
15 separateness. And if you then have witnesses
16 involved in law firm accounts, it becomes difficult
17 to administer, and people raised questions about
18 that. We're not going to sugar coat that over.

19 What does all this have to do, though, with the
20 commitment that was made in the Frank Statement, and
21 how do -- how do we suggest that you judge that basic
22 question? If you turn to the motives for CTR, if you
23 turn to the organization for CTR, if you turn to the

24 involvement of lawyers, what picture do you get?
25 Well, the motives aren't necessarily noticeable, the
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1 organization isn't necessarily terrific, and the
2 lawyers were involved heavily involved, maybe you
3 will find way too heavily involved. That's something
4 that can be supported. But if you look at the
5 science, the science that was committed to, that was
6 advised by the SAB, if you look for what actually
7 came out of this process and the way of the science
8 that was the subject of the Frank Statement, right
9 here, this process right here and the commitment that
10 was made, is there any question about the quality of
11 that science? Is there any question about the scope
12 of that science? Is there any question about the
13 Surgeon General's reliance upon it? Has anyone shown
14 you that results were mischaracterized by the
15 scientists who did them? Has anyone shown you how
16 the SAB members made mistakes and made poor
17 judgments? Nobody has shown you that. This was
18 high-quality science it was committed to, it was
19 high-quality science that was done, and it was
20 high-quality science that was published.

21 And therefore, I'm going to come over to my
22 chart here and I'm going to fill out biological
23 research. What was done? It was high-quality
24 research.

25 But we're not done. What about the commercial
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1 research? What about what CTR couldn't fund and
2 couldn't do? Do the companies just sit on their
3 hands and not do any of that? The answer to that is
4 no. Let's talk about the commercial research, this
5 over right here. Talked about CTR. We have to talk
6 about the commercial research too, biological
7 research, when I get into design.

8 Representation was made at the beginning of this
9 case that when it came to biological research,
10 internal biological research -- this is the opening
11 statement that was made by the state in this case?
12 "In fact, for decades the defendants had what was
13 called a gentlemen's agreement not to conduct
14 internal biological research, the very type suggested
15 by Dr. Wakeham, which would establish the link
16 between smoking and disease and allow the companies
17 to develop a safer cigarette." You heard from
18 Professor -- from Mr. -- from Professor Jaffe about
19 this effort, and Professor Jaffe's testimony was very
20 specific. He said here's what I'm talking about --
21 you got to get this down just right -- we're talking
22 about in-house research, and it's on live animals.
23 That's where the gentlemen's agreement was. I'm
24 going to put a circle around that. There was an
25 agreement not to do that. That was the theory of

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1 restrained trade with regard to cigarettes, is you
2 keep a bottleneck on in-house biological research on
3 live animals.

4 Now there is evidence that there was a
5 gentlemen's agreement. Dr. Wakeham testified that
6 back at the very beginning there was a gentlemen's
7 agreement. But is that the whole story? Did the
8 industry rest where it was then and do nothing
9 further? Or is there a whole map of research that
10 grew out over the years? And all the facts I'm going
11 to tell you now are completely unrebutted. They were
12 not even the subject of cross-examination. Every
13 single one of them.

14 Turns out that at the beginning the focus of
15 in-house research was on chemistry. Is there a way
16 that you can identify a chemical to remove, that if
17 we took it out, cigarettes aren't risky any more?
18 And if that's your focus, then how surprising is it
19 that, as Dr. Wakeham indicated, you leave the
20 biological work for these people over here at the
21 TIRC? You have a gentlemen's agreement that says,
22 well, all we need for commercial purposes is the
23 chemistry, we'll leave the biology over here. But
24 over time people began to appreciate that biological
25 research could also be used to rank products.

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1 Maybe -- if one biological test is done and accepted
2 and one cigarette is better than the other, maybe
3 that's commercially valuable. Or maybe the
4 biological research could tell you what to modify on
5 cigarettes.

6 So what happened is the companies began to
7 expand way beyond the chemistry and into biology, all
8 for commercial and product-related reasons. Remember
9 that after a period of time the Battelle
10 organization, under contract with BATCo, one of my
11 clients, an outside contractor, started to do in vivo
12 work. That was the ciliastasis work. Dr. Appleton
13 testified to that. Then it turns out that the
14 Tobacco Working Group, which is actually a
15 government-funded organization, also did in vivo
16 work. Then it turns out that the TRC, which was an
17 organization funded by BATCo in Britain, sponsored
18 research; they started to do work on live animals,
19 mouse skin-painting. And then BATCo contracted with
20 Battelle also to do mouse skin-painting. And then
21 the TWG decided to do mouse skin-painting. And that
22 wasn't all. BATCo built a laboratory internally and
23 in that internal laboratory they did inhalation
24 research on live animals, just the very thing that
25 Professor Jaffe says was the subject of the

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1 gentlemen's agreement. We have a whole network of
2 expanding research, biological research, research on
3 live animals. Why? Because times have changed.
4 Biological research is now part of product

5 development.

6 Now what witness came in with qualifications in
7 the field of toxicology and said, oh, the only thing
8 that really counts is the live animal research
9 in-house, and that's different from the contract
10 research and it's different from the sponsored
11 research and it's different from the Tobacco Working
12 Group? No one did that. Indeed, Dr. Appleton said,
13 hey, the research is valuable whether it's done by a
14 contract lab, TWG, in-house or it's sponsored. And
15 by the way, it turns out that today Ames research
16 might be more authoritative than the inhalation
17 research on whole animals. Technology changes.

18 This is a story about expanding research,
19 research where people are pursuing these issues
20 because they have potential commercial value. And
21 they're at each other's throats. Why are we spending
22 all this money? We want to figure out how to modify
23 cigarettes so that they can be sold maybe saying that
24 they're safer, because that would be real valuable.

25 Now who had to tell you this story? Did you

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1 hear the story from the state in this case? Did they
2 tell you all those facts when they said there was
3 this gentlemen's agreement and there was this
4 restriction? Did they stand up to -- did they step
5 up to, as I've now stepped up to, our works on CTR?
6 Did they step up to the fact that maybe the
7 gentlemen's agreement didn't have an awful lot to do
8 with what ultimately took place? We told you that
9 story. We told you those facts. We brought in the
10 witnesses to lay them out in front of you, and they
11 were completely and utterly un rebutted. Utterly
12 un rebutted.

13 Now before I get to the break here, I'd like to
14 get into the issue of lawyers again. We had lawyers
15 involved in CTR, we had lawyers involved in research
16 that was being done by the companies. You know, why
17 would the lawyers be so worried about this? Well
18 there's this basic relationship. I think I wrote it
19 down here. Science produces a public health issue
20 produces regulation and litigation, and what does
21 regulation and litigation do? It gives you lawyers.
22 And once the lawyers are involved, what do they do?
23 They're going to start to look at that science and
24 they're going to trace through what are the
25 implications of the science, changing science, new

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1 science, for regulation? What are the implications
2 for litigation? Therefore, it's totally unsurprising
3 that lawyers are going to start to say, oh, gee, what
4 about this research? And what were they concerned
5 about the research? Here's what they were concerned
6 about the research. If we, a company, go ahead and
7 do biological research using mouse skin-painting,
8 don't we appear to concede that that really does help
9 tell us something true about whether cigarettes cause

10 disease? Aren't we kind of buying into that type of
11 test and that type of procedure. Haven't we admitted
12 it, or won't somebody say we really have admitted it?
13 They get nervous about doing this kind of research
14 and attaching tobacco company sponsorship to it.
15 They get nervous about it, they fret about it, it
16 might be used against us, just like you'd expect
17 lawyers to do with that. What else are they
18 concerned about? They're concerned about the other
19 side of the equation, such as, gee whiz, what if one
20 cigarette turns out to be better under mouse
21 skin-painting than the other? Is the company then
22 going to represent that that better mouse skin-
23 painting cigarette is safer? You can't do that.
24 There are regulations saying you can't do that unless
25 you can really prove it up. And who is really going

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1 to prove up that mouse skin-painting is the best
2 indicator of biological activity? You can't do it.

3 So the lawyers were nervous that the research
4 gets done and could be used against the company. The
5 lawyers are nervous the research gets done and it
6 turns out right and the companies want to bill it as
7 being safer and it really isn't. So you got a bunch
8 of nervous lawyers. The lawyers got involved, they
9 wrote a bunch of documents, they sought to intervene
10 sometimes in the research process. You've seen the
11 documents. It happened.

12 Now have you seen the full story? Have you
13 seen -- have you seen the document that gets pulled
14 out like this where so and so writes and suggests
15 something or has a thought? How many times has the
16 state told you what was done about it? How many
17 times have they come in with that same document and
18 said, okay, now we tracked through and have seen what
19 happened and here's what happened? Pretty
20 infrequent.

21 Give you some examples. Here's a memo that was
22 written in June of 1984 by a lawyer who works
23 in-house for my firm, Mr. Wells. It's a conference
24 with B.A.T legal on U.S. products liability
25 litigation. And the second page has the following

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1 language, it says -- here we go -- "Direct lawyer
2 involvement is needed in all B.A.T activities
3 pertaining to smoking and health from conception
4 through every step of the activity." That's a pretty
5 broad statement to make. Pretty broad and bold
6 statement to make. But it turns out that the issue
7 that they're talking about is Project RIO, Project
8 RIO, which was an Ames-based test. And although this
9 statement was made, gee, it turns out that no
10 recommendation could be reached. "Conclusions about
11 recommendations for the structuring and handling of
12 B.A.T statements and programs can be made only after
13 a comprehensive review of the facts. Not enough
14 facts are known to propose conclusions at this point

15 and fact gathering would be an important immediate
16 requirement for the development of lawyer
17 recommendations." There's not even a recommendation
18 that gets made out of that meeting.

19 What happened with Project RIO itself? Did it
20 go to conclusion? Was it terminated by lawyers? Dr.
21 Appleton testified about Project RIO, and the
22 report's been produced, it's been part of Brown &
23 Williamson's files. It ran to conclusion and they --
24 and they did Ames testing on all kinds of cigarettes,
25 they did Ames testing on Brown & Williamson

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1 cigarettes. Did you get that follow-up from the
2 state? Did they give you that full picture? We're
3 prepared to be judged by the full picture, the bad
4 parts, but let's also get a little bit of credit for
5 the accomplishments and let's get at the very least a
6 full sentence of all of the facts, particularly when
7 they relate to something that raises a question.

8 Your job is to sit in judgment. You sit in
9 judgment on people and what they've done. Claims
10 have been made in this case about people acting with
11 evil intent. People have been demonized in this
12 process. You have to reach the conclusion about what
13 was going on in that individual's mind and what did
14 they go ahead and do and why did they do it. And
15 we're prepared to abide by that judgment, but let it
16 be a judgment that is informed completely by the
17 facts, the good facts and the bad facts. Let's get
18 the full story out on these documents.

19 Here is another one. This was a document that
20 commented about the concerns with Harrogate.
21 Harrogate is the TRC-funded laboratory. They were
22 doing mouse skin-painting research. And "Publication
23 of this material, while adding nothing new of a
24 damning nature, would have the effect of dignifying
25 and confirming the significance of the Wynder-type

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1 work," which was mouse skin-painting work. Now this
2 letter was written here in 1965. Did the mouse
3 skin-painting work get done? Yeah, it got done. It
4 got done by the TRC at Harrogate and it also got done
5 by BATCo. They developed their whole program on
6 mouse skin-painting, which you remember Dr. Appleton
7 testified about. An extensive program all about
8 mouse skin-painting.

9 There was a claim here that there was slanting,
10 possible slanting of the report from Harrogate.
11 Remember that? But then it turned out that the
12 Harrogate report was published. Did we show you that
13 or did they show you that? The Harrogate report got
14 published and the conclusion of that report called it
15 the way that it was. "The results provide evidence
16 that nonvolatile neutral components of cigarette
17 smoke contribute substantially to the mouse
18 skin-painting carcinogenicity of the old 24 --
19 24-hour old cigarette smoke condensate, as defined in

20 this report and, for the first time" -- in other
21 words, this is now a new development -- "that the
22 compounds responsible for this effect are stable from
23 24 hours after collection for several weeks, and that
24 these compounds were not produced as artifacts in the
25 processing leading to the stored condensate." Mr.

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1 Appleton explained, well, you know, that's not much
2 of a slant. That is a flat unfavorable decision. It
3 was a decision that says mouse skin-painting provides
4 good and valid results. Now we can all speculate
5 about where there was a draft that may have been. We
6 can speculate, or you can work with what you have
7 actual evidence of, which is the conclusion that
8 ultimately got published.

9 I can go on. And here's another one. This is
10 about additives testing that the Committee of
11 Counsel -- a memo about a meeting of the Committee of
12 Counsel, and there is some commentary that was
13 discussed concerning the possibility of doing testing
14 and then potentially, you see in the middle,
15 potentially destroying the data. Remember that memo?
16 Has anyone ever demonstrated to you any evidence that
17 this testing program was even embarked upon, that
18 this even became a recommendation that was followed?
19 Has that evidence been produced to you?

20 I'm running out of time, so I want to get
21 through. We could go through -- here's a -- I can't
22 leave this. Here's a memo that talked about routing
23 documents through a lawyer, routing BATCo documents
24 through a lawyer. Okay? Now this was dated April
25 10, and then it turned out that there was another

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1 memo dated April of -- and this is January 10,
2 there's another memo in April, four months later,
3 that says we're changing the routing back. So this
4 memo was shown to suggest that this was a long
5 practice. It lasted for four months.

6 And then Mr. -- Dr. Appleton came in to say that
7 Brown & Williamson's reports have been audited; that
8 is, the reports that Brown & Williamson got from
9 England, that there are 700 such reports, that out of
10 the records indicating which reports were distributed
11 by BATCo to Brown & Williamson, only 10 can't be
12 found at Brown & Williamson, and that none of them
13 fall during this period of time. So you got all
14 kinds of memos about reports going back and forth
15 across the ocean, but how did it all end up? It
16 ended up that Brown & Williamson had this huge
17 library of biological research that came to be at
18 Brown & Williamson that's the subject of the audit.
19 It exists today. That's the final fact after you get
20 past the documents that are stacked up one next to
21 the other.

22 What is the bottom line about the involvement of
23 lawyers and the bottom line about the research?
24 Again, you can reach the same type of analysis that I

25 suggested with respect to CTR. If you judge the
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1 research by the lawyers and the lawyers' activities
2 in the process, the lawyers were too defensive, the
3 lawyers were too aggressive, they were too worried
4 and they were too aggressive about it and they got
5 too involved. You can reach that conclusion based on
6 this evidence; you have seen the documents that say
7 that. But what about the science? Did the science
8 ultimately get done? There are examples. Janet
9 Brown's memo saying don't do the in-house research at
10 American, continue the program at the Medical College
11 of Virginia. That had an impact. But what was being
12 proposed was ciliastasis work which was being done
13 all over the world.

14 When you look at the research and the research
15 that got done and the impact that the lawyers
16 involved had, what you find is that the research did
17 get done. It is undisputed in this case that the
18 industry took the state of the art in biological
19 research from the outside community, they applied it
20 in their labs, they applied it in contract labs, they
21 sponsored that research, the results came out. It is
22 undisputed in this case that the research,
23 state-of-the-art research in fact got done even after
24 all of the hand-ringing, all of the fretting, and all
25 of the intervention of the lawyers. It got

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1 completed.

2 We'll take a break in a few minutes. I want to
3 complete this line and we'll come back and finish the
4 other two.

5 What was the effect of all of this research on
6 the marketplace? On the marketplace? It was
7 dwarfed. Think about it. 1954, the research -- the
8 controversy is unfolding in a way that Mr. Bleakley
9 already has described to you. This was not some
10 private commercial issue, this is a public health
11 issue, and the public health community responds.
12 They respond with statements and they respond with
13 research. You have heard that by 1989 there were no
14 less than 57,000 articles that had been published
15 regarding the effect of smoking and health. And that
16 was just 1989, the Surgeon General's figure in 1989.
17 57,000. That's a river that's wide and deep and
18 fast. What evidence have you seen that the industry
19 in its own research in some fashion was able to
20 overwhelm or channel that river or prevent it from
21 flowing out? What you see is just the reverse. What
22 you see is the industry -- that river is so fast and
23 it's so strong, we take from it, we take the tests.
24 We got our test procedures from the outside
25 scientific world. In a word, the effort that we

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1 engaged in was dwarfed by what was happening outside.
2 But now the claim will be made: Gee, maybe
3 there's something that you all new internally in your
4 own files and never told anybody about. What about
5 that? What about the secret that could have advanced
6 technology, could have advanced the state of science
7 that never emerged? What is it? It's been a big
8 theme in this case. It was a theme on opening that
9 there was concealment. It was a theme through every
10 single one of their experts that there was
11 concealment. It was a theme on cross-examination
12 that there was concealment. Again and again and
13 again. Indeed, the significance of this case and now
14 bringing all these documents to light has been
15 underscored to you, how the state of Minnesota
16 managed to obtain this huge volume of documents that
17 are now available. Let the sun shine in. Let the
18 light be on all these documents.

19 Now there are still gaps that remain. There are
20 documents at -- American Tobacco documents, files in
21 the hands of a company called Gallaher's abroad that
22 have never been produced to you, and the court has
23 issued an order concerning that. There are two
24 retired British scientists who have not been made
25 available for depositions here. The court has found

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1 our efforts insufficient in that area and has said
2 that you can draw an inference against my client as a
3 result of that. Those are important orders. But
4 when you assess whether to draw that inference and
5 you assess what is the nature of the information
6 that's now before the court, those gaps are
7 insignificant. Insignificant. Millions of pages of
8 BATCo files have been available -- made available for
9 inspection. People have been deposed. Dr. Dixon
10 came in to testify and he was subject to
11 cross-examination on anything and everything relating
12 to Dr. Thornton, Dr. Hurd, Dr. Felton. Dr. Thornton
13 and Dr. Heard's files have been produced. Dr.
14 Felton's documents have been identified as exhibits
15 by the state. And at no point, if you listen to Dr.
16 Dixon's testimony, did he ever walk away from
17 anything that had been said by another BATCo
18 scientist. He was there. They could have asked him
19 any question they wanted -- they've never had a
20 hesitation to do that -- and he never walked away
21 from a BATCo scientist, he never walked away from a
22 BATCo document.

23 But that's just the beginning of the story.
24 There are all the -- remember hearing about INBIFO,
25 the Cologne biological research facility that Philip

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1 Morris developed and maintained, how those files
2 haven't been produced for discovery in this case?
3 There are tens of millions of pages that have been
4 produced in this case. They're all sitting here and
5 they've been combed through. There are scores of

6 witnesses who have been deposed.

7 The time has now come. Where is the silver
8 bullet? Where is the magical secret of biological
9 research that these companies uncovered in the heart
10 of their laboratories and it's now come to light and
11 we now know the secret about smoking and health? For
12 a case that's driven by concealment and the claims of
13 concealment, wouldn't you expect by this late date
14 that that fact be identified? Where is it? You
15 haven't seen it. What you've seen, in fact, are
16 editorials. We've got editorials by people from the
17 American Medical Association, you got editorials by
18 former Surgeon General Koop, people who have no
19 interest in the continuation of cigarettes as a
20 lawful product. They are editorials that talk about,
21 oh, my goodness, if we had had these documents
22 before. You comb through those editorials, you find
23 out what fact has now come to light. Where has the
24 light now shown? You won't find it.

25 You have got an obligation that goes way beyond
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1 those editorials. You've got more than those
2 editorials have. You've got the benefit of industry
3 experts, you've got the benefit of experts from the
4 state, you've got the benefit of the efforts of these
5 people here to comb through the documents, you've got
6 it all. And you can't rest with the editorials, you
7 have to find the facts. That's your job.

8 There will be no silver bullet. Nobody has
9 unlocked the secret of the safer cigarette. Nobody
10 has unlocked the secret of how smoking actually does
11 cause disease. Nobody has withheld from the
12 marketplace those critical facts and those critical
13 elements. They're not here.

14 What's the effect on the consumer of the
15 biological research? We would like it to be better.
16 But there's none. We never represented to the
17 consumer that we had the secret biologically safe
18 cigarette. We never represented to the community --
19 to the consumer that our cigarettes had lower
20 biological activity than somebody else's cigarettes
21 and that they were there -- and they were therefore
22 safer.

23 Would that all this effort had produced an
24 answer. It has not. And after the break, I'm going
25 to tell you about what it is that we did. If we

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1 didn't have that answer, what it is that we can do
2 going forward.

3 This will be a good time, Your Honor.

4 THE COURT: All right. We'll take a very
5 short recess.

6 THE CLERK: Court stands in recess.

7 (Recess taken.)

8 THE CLERK: All rise.

9 (Jury enters the courtroom.)

10 THE CLERK: Court is again in session.

11 Please be seated.

12 MR. BERNICK: Thank you, Your Honor.

13 I'm going to take you back to the Frank
14 Statement again so we can start all these with the
15 Frank Statement, and we'll move to a different part
16 of the Frank Statement now. "We accept an interest
17 in people's health as a basic responsibility,
18 paramount to every other consideration in our
19 business." An often-quoted line in this case, and
20 justifiably so. What does that have to do with
21 product design? Again and again the state has set up
22 that statement as creating a conflict.

23 You heard -- every single executive was asked
24 that question: Well, you know, you're in there for
25 your shareholders, but this says you're in there for

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1 health. You know, which is higher? And you can't
2 have every one be -- everything be higher, because
3 there's one that's got to be paramount. And that was
4 the conflict that was set up each and every time with
5 the executives, is which comes first, profit or
6 health?

7 There's one part of that equation that was left
8 out, and that was the consumer. And the reason the
9 consumer is so critical here is that beginning in the
10 1950s the market -- the market created by the demand
11 of consumers -- was inalterably affected by health
12 concerns. What is the best way to make money in that
13 marketplace? It's to develop products that are
14 responsive to customers' concerns with health. The
15 commercial and the health purpose merge in that kind
16 of market. There is no conflict. Anyone who could
17 have come up with a truly safer cigarette would have
18 walked away with huge sums of money. That's why all
19 the research ended up getting done. And the fact
20 that there is no conflict here, why do you think the
21 tobacco companies made the statements they did back
22 in 1954? Because they realized -- they saw that blip
23 coming down, they realized that forever the market
24 was going to be driven and affected by health
25 concerns.

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1 So the real issue that this gets -- this keys --
2 this keys up is, well, what was done with the
3 products that were being made to sell to that
4 marketplace and respond to those concerns? Did the
5 companies in product design discharge the obligations
6 to be responsive to health concerns? And the answer
7 is unquestionably yes. This is an area of the case
8 where there aren't shades of gray. This is an area
9 of the case where it's clear and it's unrebutted and
10 all that you've heard is theory after theory, that is
11 nice generalities about product design, it is
12 absolutely undercut by the facts of how cigarettes
13 are made and how they're smoked. That's what I'm
14 going to tell you about for the next little while.

15 First there was a statement again made in

16 opening, it said -- again it's by the state -- "In
17 other words, the defendants would do nothing to
18 change their products unless and until they were
19 required to do so by government or as a result of
20 being held accountable in litigation." Huh-uh,
21 that's not how the market worked, that's not how the
22 conditions worked, that's not how the changes were
23 made.

24 I'm going to review them for you. First, there
25 was the effort at selective filtration and bioassay.

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1 Remember the focus on chemicals and the suspicions
2 that benzpyrene was the chemical that had to be
3 removed, and remember how that didn't quite work out
4 because Dr. Wynder in 1957 said maybe it's not
5 benzpyrene? The Surgeon General agreed in '54. And
6 the next theory was ciliastasis. We had all those
7 charcoal filters. Those were put out there. They
8 did better in those tests. And that theory went out
9 of vogue. Then you had inhalation tests. The
10 problem with inhalation tests is you couldn't make
11 the animals get human-type cancers, so you couldn't
12 establish a baseline, one very useful in designing
13 cigarettes. Then you had the Ames test that followed
14 on, and the Ames test was one of the tests that was
15 relied upon as the massive effort that went into the
16 Premier product. So you have a whole series of
17 different theories and different assays, but because
18 it is unrebutted, there is no one test, there is no
19 one bioassay that tells you the truth, you can't rely
20 upon these tests to tell you what designs to change
21 and what designs to come out with. And this is the
22 problem where biological research did not produce an
23 answer to product design.

24 The target was called a moving-target product.
25 If you take a look at the table that was shown, these

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1 were all the different kinds of tests up at the top,
2 and under some tests some changes did well, under
3 other tests other changes did well. No consistent
4 guidance. So selective filtration didn't pan out.
5 And that is the backdrop for the next move that was
6 made, which is the soul of simplicity and has been
7 the driver for change for over 40 years, which is if
8 you can't figure out what it is that's in smoke
9 that's creating a risk, just lower the overall amount
10 of smoke that you're delivering to the smoker.
11 General reduction. And this is an undisputed fact in
12 this case, that under the FTC method of delivery,
13 this is Dr. Samet's paper, deliveries have come down
14 and down and down and down. Now that's a fact.
15 That's their own expert. It's a standard
16 methodology. That's what occurred. And did we wait
17 for people to tell us you got to do it? No.

18 This is a chart that came in through -- through
19 Dr. Scheffman, and what it shows you is that this
20 trend began almost at the beginning of time in the

21 smoking-and-health controversy. There was no
22 requirement for it. It was the move to filter
23 cigarettes. And -- and my client actually was the
24 pioneer in this area. You can see B&W at the front
25 edge of this because they put on the cellulose

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1 acetate filter.

2 So this was an industry that moved to respond to
3 consumer demand and concerns long before there were
4 health authorities saying you -- you should do this
5 or this is the right policy. Surgeon General hadn't
6 even filed a report until 1964. We moved on it, we
7 responded to it.

8 And it wasn't just filters. Surgeon General in
9 1979 filled out a whole table, this was Dietrich
10 Hofmann's table, about a whole series of methods that
11 were used to reduce overall smoke deliveries. You
12 saw this with Dr. Townsend. You saw this actually on
13 cross-examination among some of the states experts.
14 All of these different moves had the effect of
15 reducing deliveries, and which had the effect of
16 reducing biological activity according to all of
17 these different measures all put in place.

18 Whatever happened to benzpyrene in the process,
19 one of the old suspected bad actors? The effect of
20 all these changes was to lower the actual amount of
21 benzpyrene in cigarettes. That's the whole merit of
22 general reduction, is that you're not targeting an
23 individual chemical, but if you reduce the overall
24 smoke delivery, whatever is in smoke comes down.

25 Now after this fact has been out there and the

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1 deliveries have come down, what has taken place is an
2 unending, unremitting attack on what ought to be
3 recognized as a major accomplishment. Theory after
4 theory has been advanced to say, oh, that's all not
5 real, there really wasn't a general reduction, none
6 of these changes are meaningful. Theory after theory
7 after theory. And this is now why we have the jury
8 system. You get to reconcile each one of these
9 theories in these claims with your best view of the
10 facts. If they're right, they're right; if they're
11 wrong, they're wrong. Call it like it is. But let's
12 look at the facts.

13 What was the first theory? Compensation,
14 another one of the general reduction matters.
15 Because people when they smoke down, they smoke
16 harder and they get the same amount they had before.
17 That's the basic idea of compensation. And the first
18 thing that was said about compensation was that it
19 was a deep, dark secret. Remember on the direct
20 examination of Dr. Hurt, he went to this -- this --
21 went to this series of JAMA articles that talked
22 about Brown & Williamson documents, and he pulled out
23 of there a statement about the fact that it was known
24 internally -- it was known internally that there was
25 smoker compensation before it was known to the

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1 outside world. This says, "This phenomenon known as
2 smoker compensation was acknowledged internally in
3 the tobacco industry by the early 1970s, but was not
4 appreciated in the scientific community until the
5 1980s." It's basically saying we held back. And
6 remember it has dates. We knew it by the early '70s
7 but not appreciated by the scientific community until
8 the '80s. And just quoted that article. Said, well,
9 here it is, it's part of that series of articles,
10 remember, that was attached to the editorial. Well
11 what did the facts show? Here is -- here's Dr.
12 Hurt's testimony on examination by the state. "This
13 phenomenon, known as smoker compensation, was
14 acknowledged internally in the tobacco industry by
15 the early '70s but was not appreciated in the
16 scientific community until the '80s. Is that
17 consistent with what you found by your review of
18 documents?

19 "Yes, it is." He signed on.

20 But it turns out on cross-examination, did he
21 actually do the analysis that was necessary to find
22 out whether it was true?

23 "All right. I'm asking you this: Did you take
24 a look and see when the fact of compensation, the
25 theory of compensation, when it first appeared in the

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1 published scientific literature for everybody to see?

2 "Answer: I don't recall that I did that, no."

3 So he never made his own inquiry. He just took
4 those JAMA articles, and that was fine by him. That
5 was consistent with what he saw in the documents.
6 That was fine. Well, if that was so, why -- why do
7 we need him? Why don't we just come and put the
8 articles before you?

9 Well it turns out that if he had done the
10 research, he would have found that the original
11 articles that were published on compensation actually
12 were funded by the tobacco industry in Britain.
13 Remember the Ashton paper, 1970? It's now being
14 published under sponsorship by the tobacco industry,
15 sponsored in 1970. Compare that with the JAMA
16 article published, "Puffing Frequency and Nicotine
17 Intake in Cigarette Smokers," one of the first
18 published articles. The pioneering work on
19 compensation was sponsored by the tobacco industry
20 and was published.

21 But the science didn't stand still, it evolved.
22 And who was it that told you about the evolution of
23 science on compensation? Was it the state, or was
24 the state content, once again, to take the internal
25 document that found the phenomenon and say, see here,

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1 that general reduction, it's not real, this is all a

2 lie? Who had to bring out the science of what
3 ultimately happened to the compensation issue? And
4 it's completely un rebutted. They continued to look
5 at it. This is an article by Dr. Ashton,
6 "Self-Titration by Cigarette Smokers," again 19 --
7 this is now 1979, it's nine years later. She is
8 writing again in the British Medical Journal. And
9 what does it turn out? One of the facts about
10 compensation that was very important, it's
11 incomplete, "Figure 2 shows that the extent to which
12 actual intake of nicotine is equalized across brands
13 varies greatly between subjects, and, even
14 considering mean values for the group, compensation
15 for standard delivery differences is obviously
16 incomplete." That was fact one: incomplete.

17 Fact two, what about hole coverage? Remember,
18 the testimony where it was pointed out that there was
19 the little perforations, and the question is: Do
20 people block those holes when they smoke with their
21 fingers or with their lips so that the net effect is
22 that there isn't ventilation and without ventilation,
23 the deliveries are high? Remember that whole thing?
24 And then it turns out that there have been studies
25 done. First, the fact of the ventilated holes was in

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1 the Reader's Digest in 1959. But then studies were
2 done to determine what is the frequency with which
3 people actually do this as opposed to, when they
4 suck, lifting their fingers off like that, what is
5 the frequency, and how much did the people put that
6 filter that deeply into the mouths that they really
7 cover up the holes? Well this study has been done
8 and it was a study reported by Dr. Dixon. "In
9 particular, ventilation hole coverage by fingers is
10 relatively small - less than 4 percent of smokers
11 have their fingers near the cigarette puffs during
12 the whole period." Then this study takes a look at
13 lip coverage. And remember the diagram here where
14 they measured how far the lips came in relationship
15 to the ventilation holes? And then here was the
16 data. The data said two things, it said -- here is
17 the ventilation zone right here, and it said there
18 are very few people who are over on this side who
19 actually put it that far into their mouths. Most
20 people are over here. And regardless of whether you
21 cover up the vent holes or not, the basic nicotine
22 levels that are found are unaffected. Actual, hard,
23 scientific data saying vent hole blocking is an
24 issue, but it's an issue with respect to very few
25 people, and even when it's done, it does not have the

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1 effect of increasing blood deliveries of nicotine.
2 It's the science. Completely -- there's not one
3 person who has produced a single scientific fact
4 contrary to what you see up on that screen.

5 What about how long term it is? It turned out
6 that compensation is not a long-term phenomenon.

7 Studies done after long periods of time find that
8 "both the studies of inhalation patterns and smoking
9 patterns presented would appear to suggest that there
10 are no differences between habitual middle and low
11 tar smokers and the way in which they smoke and
12 inhale their respective products." That after the
13 initial switching period, there's a period of
14 becoming accustomed to the lower delivery brands, and
15 then at that point the smoking behaviors of people
16 who smoke high delivery product and low delivery
17 product are comparable. And that was also Dr.
18 Benowitz's conclusion. Remember the statement in the
19 New England Journal that said overcompensation
20 appears only to persist for shorter periods of time?

21 So we went from this issue of compensation, gee,
22 there's no such thing as low delivery, to, gee, maybe
23 it's incomplete, then the hole blocking is
24 infrequent, then it appears now to be shorter in
25 duration so that over time people who switched

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1 basically bring their deliveries down over a period
2 of time.

3 Now the purpose of the rank of the FTC
4 deliveries -- remember, the FTC itself in that press
5 release said it's not to give you the actual
6 measurement, it's to rank cigarettes relative to one
7 another. And that method is still used today. It's
8 a ranking methodology, a standardized methodology.

9 Next theory was tar/nicotine ratios. Gee, the
10 deliveries are falling, but maybe the ratios were
11 changing. Remember that one? That was the next
12 theory. It turns out, first of all, that this idea
13 was actually suggested by the Surgeon General of the
14 United States. Remember all the discussion at the
15 beginning of the case about manipulating nicotine?
16 But then the Surgeon General of the United States
17 said, well gee, maybe we ought to change those
18 ratios. And the testimony of Dr. Robertson on
19 cross-examination -- if I can get it on here -- was
20 clear that basically he agreed with what the Surgeon
21 General was proposing.

22 "Would you, Dr. Robertson, consider the research
23 being proposed here by the Surgeon General to be
24 research into the manipulation of nicotine levels?

25 "Answer: Well he's talking about cigarettes

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1 that vary systematically in tar-to-nicotine ratios
2 are needed for this research, so that I see an
3 objective statement asking for such items.

4 "Question: Would that be the manipulation of
5 nicotine?

6 "Answer: Well if nicotine changes, if it goes
7 up or it goes down, as it is here, that's a form of
8 manipulation."

9 So all of a sudden manipulation is something
10 that the Surgeon General is talking about for health
11 purposes? The research was pursued. And then it

12 turns out, this is the Stepney paper, that even when
13 you change the tar-to-nicotine ratios, it doesn't
14 actually show that there's an advantage in reducing
15 deliveries. "In terms of reducing mouth-level
16 exposure to tar, however, the medium-nicotine low tar
17 cigarette had no advantage over the control low tar
18 product." So maybe the health purpose of changing
19 the ratios wasn't panning out.

20 How did consumers like it? Well there was
21 Project GYPSY. Project GYPSY was a BATCo project,
22 and they said, "However, in our view, such cigarettes
23 did not have commercial viability and smoke panel
24 comments often included such terms as 'poor smoke
25 texture' and 'unbalanced smoke.'" So there were

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1 problems with significant alterations to the tar and
2 nicotine levels of cigarettes, even though that
3 research was suggested by the Surgeon General and was
4 done by the companies, and that's why you saw those
5 internal documents come out talking about
6 tar/nicotine ratios.

7 At the end of the day, tar and nicotine came
8 down, and we're still left with this basic curve. So
9 we need another theory. What's the next theory?
10 Well the next theory is that there are different
11 kinds of nicotine. There's free nicotine and there's
12 bound nicotine. And theory number three was the pH
13 of cigarettes is being boosted with ammonia, and the
14 net result is an increase in the amount of free
15 nicotine, and that free nicotine produces a faster
16 and bigger hit. Remember, "free based cocaine" was
17 term -- was the term that was used. We had this
18 whole theory about fast absorption, the bolus effect,
19 goes to the brain faster, seven seconds, boom boom
20 boom. And then you start to look at the facts, the
21 facts about ammoniation. First fact was, gee, it's a
22 secret, and it turns out the fact that pH can be
23 changed and results in -- pH can be changed with
24 ammonia was well known. This is the National Cancer
25 Journal publication 1972. "What are the implications

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1 for less harmful cigarette? Apart from replacing
2 flue-cured tobacco by air cured, low sugar tobacco,
3 which in the form of cigarettes probably would not be
4 readily acceptable to the majority of the smoking
5 public, one suggestion would be to raise the pH of
6 the smoke of cigarettes containing flue-cured
7 tobacco." 1972, National Cancer Institute saying
8 gee, why don't you explore pH? It's not a secret.

9 Was it done? Did we change the pH of cigarettes
10 by adding ammonia? What do the facts show about
11 that? Well this was an area of the case where we
12 have a huge advantage. The test of that fact is the
13 product. You can go and pull all kinds of documents
14 out of the files and discuss all kinds of theories
15 and possibilities, but we can test the product to see
16 what was actually done. And the data was produced.

17 I've drawn here 1950 to 1996, and I got a pH scale on
18 the left that covers five through eight and a market-
19 share scale on the right. Okay? And Claude Teague,
20 whose memo, Exhibit 13155, you probably saw a dozen
21 times, which was written in 1973 and raised the
22 hypothesis, the theory, that the reason that Marlboro
23 market share was taking off was because they were
24 boosting the pH with ammonia. Remember that? That's
25 when he wrote this theory. We saw -- must have seen

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1 that memo a dozen times.

2 What happened to pH over time? Well we learned
3 from the Surgeon General's report that at a pH of
4 about 6.5, at that pH or below, the nicotine is
5 essentially bound. 1979 Surgeon General's report.
6 There we go. "Since cigarettes in the United States
7 and in most foreign countries are made of flue-cured
8 tobacco, are -- are blends" -- let's see,
9 flue-cured -- "are blends with flue-cured tobacco as
10 a major ingredient or, in a few cases, are blends
11 with Turkish tobacco, the pH of the resulting
12 mainstream smoke is below 6.5 and thus essentially
13 contains only protonated nicotine." 1979 Surgeon
14 General's report. So the work with the 6.5.

15 What were the measurements that were taken?
16 Well we've seen measurements. These were
17 measurements that were actually probably taken the
18 year before by Brunnemann and Hoffmann, Hoffmann
19 being one of the best-known experts in cigarette
20 design. And he actually has charts where he shows
21 the pH of cigarettes, if I can pull it up. It's this
22 one right here. And as you can see, if you take a
23 look at four, five and six, four is the Kentucky
24 Reference Cigarette, five is a blended filter tip
25 cigarette, and six is a blended cigarette without

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1 filter. These are both experimental and Kentucky
2 Reference. You can see that four, five and six are
3 all below 6.5. So we're sitting there in 1972 with
4 measurements that are in this area here, below 6.5.

5 Well now if the industry was going to catch up
6 with Marlboro, and Marlboro were really producing
7 lots of free nicotine, wouldn't you expect that by
8 the time everybody else is ammoniating cigarettes,
9 you'll see some pretty high pH values? You got a
10 test. Test was done 1997. And this is the Rickert
11 report. It's in evidence. And here's what gets
12 reported. Let me get the whole thing. Brand
13 description, the number one brand, Marlboro, it's
14 number two, 6.028. It's not even kissing 6.5. And
15 for all of Marlboro's market share, how do you find
16 the secret to Marlboro's market share in the
17 difference between 6.028 and 6.068? Where is it?
18 Where is the goosing of the pH? Where is all this
19 ammonia leading to quantities of free nicotine? It's
20 not in the product.

21 Now there's some variation that you see, and

22 what accounts for variation? You heard evidence of
23 crops, crop years accounting for variation. You
24 heard the fact that recipe changes pH. If you
25 increase the amount of burley tobacco, you increase
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1 pH. If you increase the amount of flue-cured
2 tobacco, you decrease pH. If you add enough ammonia
3 you can increase pH, but if you use sugar in your
4 recipe, that decreases pH. So variations in recipe,
5 variations in blend all will affect pH.
6 Are the variations that are reported by Rickert,
7 are they even perceptible to the smoker? Does it
8 really give the smoker a bigger hit? Well, we had a
9 big debate. We had Dr. Robertson who came in, and he
10 gave us a lung model, focused on the lung and said
11 gee, if you increase the amount of pH, you're going
12 to increase absorption. Remember that? There's one
13 problem: Dr. Robertson didn't tell you about what
14 happens to the smoke on the way down. And if it's
15 higher pH, it may be able to get absorbed more
16 quickly in the mouth and throat. That's what Dr.
17 Dixon testified to. So if you increase pH,
18 absorption in the mouth goes up, absorption in the
19 throat goes up, and the Surgeon General has said once
20 you're down in the lung, pH doesn't make a
21 difference.

22 What effect does all of that have on speed of
23 delivery to the brain? That's anatomy. The mouth
24 and the throat, the absorption of the blood system
25 there is on the venous side. It takes the long way
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1 around through to the heart and back to the brain.
2 Whereas absorption in the lung is the fast route. So
3 if you increase absorption in the mouth, you increase
4 it in the throat, the speed to the brain is slowed,
5 and therefore the expectation is if you actually did
6 increase pH enough, all you effectively do is
7 increase absorption in the mouth and throat and slow
8 the delivery of nicotine to the brain. And that's
9 not just our theory, that's exactly what Dr. Benowitz
10 said in the Canadian report.

11 He says, "That is" -- I'm going down to the
12 middle -- "That is if you have high pH, you can
13 absorb a lot from the mouth. Whereas when smoking
14 the usual blond cigarettes, the smoke of which is an
15 acidic pH, you don't absorb anything in the mouth.
16 The higher the pH the more nicotine impact there
17 would be on the throat.

18 "One would experience more irritation, more of
19 a nicotine type sensation. I don't think that
20 differences in pH would make much of a difference in
21 bioavailability," that is the ultimate absorption,
22 "although it would impact on how strong the cigarette
23 tasted."

24 He's not saying what Dr. Robertson is saying.
25 He's not saying boost the pH, it's going to give you
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1 that hit. He's saying what Dr. Dixon said, it will
2 give you irritation in the mouth and throat, unlikely
3 to change bioavailability. Not just Dr. Dixon's
4 words, this was Dr. Benowitz that's talking.

5 Now with all these theories floating around and
6 pH and all the like, does it really make a difference
7 to the smoker? This was the most interesting
8 question that I thought that there was asked Dr.
9 Robertson on cross-examination. It's this one right
10 here. I asked him, I said, okay, if there -- these
11 variations in pH that we see in the Rickert report
12 are really significant and they really give you that
13 hit fast, shouldn't it be perceptible to the smoker?
14 And I asked him, I said are you saying that these
15 variations, the difference between 5.9 and 6.028, is
16 perceptible to the smoker? May be, may not be. I
17 can't tell you the answer to that.

18 Well if he can't tell us the answer to that,
19 what is his theory all about? We can theorize all we
20 want about lung models and absorption and who's right
21 and where it's been written, but what counts is what
22 makes a difference to the smoker, and their whole
23 attack on nicotine and pH is that we made up for that
24 general reduction by giving the smoker a harder hit
25 with free nicotine. Their own expert can't stand

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1 behind that statement.

2 Let's talk about the reality of what was
3 actually occurring. The reality of what was
4 occurring was that the companies since 1954 -- this
5 is a Reynolds document -- were looking at ammonia as
6 a way of changing smoke quality, i.e., taste. Do
7 people like it or not? "Research is being conducted
8 by this company upon tobacco stems in an effort to
9 increase their smoking quality. One mode of approach
10 to the problem upon which extensive work has been
11 done is ammoniation by gaseous ammonia." It's a
12 smoke-quality issue.

13 Later on Marlboro came along, and as Dr.
14 Robertson admitted, when Marlboro introduced ammonia,
15 it was for manufacturing purposes. It helped --
16 helped to release pectins which caused a binding of
17 the tobacco and it facilitates the creation of
18 tobacco sheet. So it was -- it was developed as a
19 technique for manufacturing purposes.

20 Now it's true that Claude Teague in 1973 had
21 theorized that there might be an effect on free
22 nicotine. But do we stop there or do we find out
23 what actually occurred? Do we find out why is it
24 that ammonia started to get added? And when you take
25 a look at why it is that ammonia started to get

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1 added, it was not by reason of some esoteric nicotine
2 theory, it was because, at the end of the day, there

3 was the ability of ammonia to react with other parts
4 of the recipe and form favorable taste and quality
5 features.

6 This now is 1980, eight years later. "The
7 concept is to form amino-sugars and related compounds
8 on the surface of the tobacco. This can be
9 accomplished by spraying reducing sugars on tobacco
10 then placing the material in an ammonia atmosphere
11 and thus allowing the low temperature surface, sugar
12 plus ammonia reactions to take place." And those are
13 the low temperature reactions that produce the flavor
14 notes.

15 What is the effect on free nicotine when you're
16 using both ammonia and sugars? They're balancing.
17 Ammonia is balanced by sugar. pH will depend on what
18 the recipe is, what tastes good, and it will drive
19 the recipe in exactly the same fashion that when
20 blends of cigarettes were first done, the balance
21 between burley and flue-cured produced taste notes
22 and could have pH effects as a consequence. All that
23 this technology is is a way of taking a natural
24 blending process and influencing it. All the
25 companies -- most of the companies have gone to

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1 ammoniation of cigarettes.

2 What is the ultimate impact on market share?
3 Well we're sitting here today and the Marlboro Man,
4 boy, they're doing just terrific. They're out of
5 sight. Are they the only ones who ammoniate?
6 Huh-uh. Everybody loves to ammoniate, everyone's got
7 their own recipe. Has ammoniation helped all the
8 products that went through the tank? Huh-uh. It's a
9 theory. It's not reconcilable with the reality of
10 how our business operates. Can't make it happen with
11 the facts.

12 Let's go to the last theory, which is the
13 health-risk theory. This is a theory that says,
14 well, you know, I guess at the end of the day, even
15 if all the deliveries may be lower, you really misled
16 people into thinking that it was going to be safer,
17 it was going to be less risky, and it really isn't.
18 That's what this theory said. And they have shown
19 ads -- this is an ad for an American product,
20 Carlton, "I switched to less tar. Carlton is lowest
21 in tar and has a light mild taste I really enjoy. I
22 switched, you can too. Carlton is lowest in tar and
23 nicotine." That's what the ad says. The theory is
24 this is all part of misleading people to believe that
25 their risk is actually reduced even though you don't

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1 see word one about health risk in the ad. Now I
2 asked --

3 The question was asked of Dr. Hurt in his
4 deposition, are you really saying that this whole
5 thing was some ploy by the industry to mislead
6 people? At his deposition he was --

7 MR. CIRESI: Well, Your Honor, I'm going to

8 object to the playing of any deposition unless it was
9 introduced into evidence.

10 MR. BERNICK: At page 1617 of the trial
11 transcript.

12 MR. CIRESI: All right.

13 MR. BERNICK: I'm sorry, Mike.

14 And here was the question that was put: "'Is it
15 your contention that the introduction of low tar
16 products was just a ploy by the tobacco industry to
17 offer smokers health reassurance?' And your answer,"
18 which is being read in this trial, "your answer was,
19 'I think it was in part response -- in part in
20 response to what was beginning to become common
21 knowledge among the scientific community that
22 cigarette smoking caused lung cancer, heart disease
23 and emphysema, and I think it was in response to that
24 to try to figure out a way to overcome those health
25 concerns. So I think that's the origin of it,

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1 because those things happened in the 1950s and 1960s,
2 and the first thing that happened, of course, was
3 putting filters on them. Putting filters on the
4 cigarette was kind of the first move to, quote,
5 health reassurance, close quote, sort of mode. When
6 the low tar/low nicotine cigarette technology was
7 invented or introduced, if you will, that fed into
8 it.'" And he goes on to say, "'I think it was in
9 response to the concerns being expressed by the
10 public health community.'

11 "Question: Was that your answer when your
12 deposition was given?

13 "Answer: That's what it says."

14 And in point of fact, the history of low
15 delivery cigarettes is a history of repeated
16 suggestions by the public health community that if
17 smokers cannot quit, they should switch to a lower
18 delivery product.

19 I could, if I had more time, take you through
20 Dr. Wynder in 1957, Surgeon General report 1981, the
21 ISC fourth report in 1988. That's the one that, if
22 you remember, has the statement at the bottom that
23 talks about if you can't stop smoking, take steps to
24 reduce your risk, including smoking a lower delivery
25 brand. This was a public health initiative along

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1 with the initiative to get people to quit.

2 What did it do? It created a consumer demand.
3 "Consumer preference for low tar and nicotine rated
4 cigarettes accelerated during the 1970s when NCI
5 supported research strongly suggested that cigarettes
6 offered the consumer a reduced risk of cancer." Who
7 is the NCI? The National Cancer Institute. That's
8 what drove this demand.

9 So if I take a look at where you end up, at the
10 end of the day, what is the dynamic that is now being
11 created? It's this one. Health authority says low
12 risk may be present based upon our data. Smokers are

13 encouraged to switch down. Demand is created. Isn't
14 it part of the paramount responsibility to sell a
15 product that meets that demand? If a smoke -- if the
16 public health authorities are saying reduce your
17 risk, if you can't quit, switch, and consumers want
18 to switch, should we not sell that product to them if
19 our paramount responsibility is to be concerned about
20 health?

21 And by the way, there's no conflict. I mean if
22 they want that product, they're going to buy it and
23 we'll make money. It's the nature of the
24 marketplace. It's conditioned by health concerns,
25 it's conditioned by the pronouncements of the public

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1 health authorities, it's conditioned by information
2 that is generated by outside researchers in these
3 areas. Well wait a minute, is there really a risk or
4 not? Is there a lowered risk or not? We go back and
5 forth. 1981, Surgeon General says there's a reduced
6 risk of lung cancer. In 1996, Dr. Samet writes that
7 that advice is still good advice. He quotes the 1981
8 report which discusses "Today's lower-tipped" -- or
9 "filter-tipped, lower tar and nicotine cigarettes
10 produce lower rates of lung cancer than do their
11 higher tar and nicotine predecessors, although still
12 much higher than non-smokers." And he goes on to
13 say, "The more recent case-control evidence remains
14 consistent with the first component of this
15 conclusion," which is that there is still evidence of
16 the lower risk of lung cancer. And this is 1996.

17 Now Dr. Samet took the stand, and when he took
18 the stand he recognized that he had said this, but he
19 then went on to point out that there was this study
20 called CPS-II which had come out more recently. And
21 then on cross-examination -- and he suggested that
22 maybe that changed his opinions. But on
23 cross-examination it came out that when he did this
24 expert report in this case, this lawsuit, he already
25 had the results of the CPS-II study.

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1 "Well you had the results of the CPS-II study at
2 the time that you rendered your expert report -- that
3 you prepared your expert report in this case;
4 correct?

5 "Answer: Correct.

6 "Question: And in preparing your expert report,
7 you were careful to review all pertinent literature
8 on the subject matters covered in that expert report;
9 right?

10 "Answer: Correct.

11 "In your expert report you stated -- well you
12 gave the opinion that smokers of filtered cigarettes,
13 in comparison with smokers of non-filtered
14 cigarettes, have an approximately 20 percent lower
15 risk of lung cancer; correct?

16 "Answer: Yes."

17 CPS-II, his own prior publications, he gives a

18 report, he says that 20 percent risk is there as
19 between these groups of people.

20 Now at the end of the day, can we make the
21 representation, today, can companies take out ads and
22 say low delivery cigarettes are safer? No. We can't
23 prove that. We can't make that claim. But the
24 information that was available, the low risk data
25 generated not by the company but by people outside of

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1 the company, that information was enough to get the
2 health authorities to make a recommendation to the
3 consuming public. Now once that recommendation was
4 made, then they have the latitude to make those
5 recommendations. Hard for us to get into that
6 business. Yes, we sold that product that met that
7 demand. Yes, we relied upon the advice that the
8 health authorities were providing based upon that
9 data, even though we could not make our own
10 commercial statement about the health effects of low
11 delivery cigarettes. Why could we not? There's
12 something called the Cigarette Advertising guidelines
13 set by the FTC that talk about what it is that we can
14 and can't say. Indeed, back then we couldn't even
15 include tar and nicotine figures. And the FTC
16 changed its mind -- you heard from Professor
17 Scheffman -- the FTC changed its mind in the mid-
18 1960s and said, well, now you can put on tar and
19 nicotine figures. So not only is this relationship
20 there, but the relationship is one in which ads can
21 contain tar and nicotine numbers and be in accordance
22 with the FTC's regulation. That's what the evidence
23 shows.

24 The evidence shows that we could have stopped
25 this general reduction. After all these theories are

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1 done, general reduction is there, it's strong, it's
2 hard, it's prominent, but we still didn't stop with
3 it, we went all the way down the road. We not only
4 did selective filtration work and we did general
5 reduction work, we developed novel products, and
6 you've heard about them. First of all there were
7 novel products on the low particulate side; that is,
8 it would reduce the amount of particulates. That was
9 ARIEL, or AIRBUS later on. Premier, huge effort,
10 hundreds of millions of dollars, produced a product
11 that was well-recognized as being lower in the
12 delivery of most of the constituents that were
13 controversial, much lower than anybody else. Peer-
14 reviewed research published -- peer-reviewed panel
15 research, then published for all to see, and yet
16 still failed in the marketplace. Was opposed. Then
17 you have all the Philip Morris products, you had --
18 can't even remember all Greek letters -- you had
19 Delta, Delta 2, Sigma and Accord, all low delivery
20 products. But that wasn't the only thing. They went
21 to the other extreme, low tar side. What about low
22 nicotine side? Next. They went to all the extremes

23 to explore all of the options. At the end of the day
24 there wasn't a single avenue of design that held real
25 promise that didn't get explored. There were major
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1 changes that were made, there were major efforts that
2 were undertaken to look for further areas of change,
3 product design, clearly major changes.

4 What about competition in this area, competition
5 in the area of changes? We competed not only for
6 general reduction, we competed in areas that didn't
7 even work out. We fought with one another over the
8 dry wells and the empty holes, the fool's gold. We
9 all went for it, every single area.

10 Is there some big secret that's out there?
11 Nobody's identified it. Is there a silver bullet for
12 cigarette design? Nobody's told us about it. We've
13 spent a hell of a lot of money trying to find it. We
14 can't find it.

15 What was the impact on the consumer? The
16 consumer had all kinds of choices coming out of this.
17 They want charcoal filters, they want reduced
18 delivery product. And in test markets they even got
19 to try out the new stuff, high delivery, low
20 delivery, and even today a free range of options that
21 are available in cigarettes. But one thing that they
22 can't choose is a safe cigarette. There's no such
23 thing.

24 Did we make claims that the cigarettes were
25 safe? You will see no evidence of a pattern of

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1 claims being made that cigarettes are safe.
2 Instances would occur where the FTC would raise an
3 issue about a given ad or a given campaign, but where
4 is the campaign that made the representation that
5 cigarettes are safe? That claim was not made.

6 We sold to a market that was conditioned by
7 concerns with tar and nicotine, we sold to them
8 because the federal -- the health authorities wanted
9 it to happen, and we did it consistent with
10 regulations, but we did not represent that those
11 cigarettes are safe.

12 MR. BERNICK: Your Honor, I have
13 about maybe 10 minutes left, but I know it's very
14 late.

15 THE COURT: It's up to you.

16 MR. BERNICK: Should I just plunge ahead?

17 THE COURT: Well, your timing projections,
18 they really --

19 MR. BERNICK: True enough.

20 THE COURT: -- don't correspond with my
21 watch. If you can go for 10 minutes, I'll allow it,
22 but at 10 minutes to 1:00 I'm going to cut you off.

23 MR. BERNICK: Okay.

24 THE COURT: Okay?

25 MR. BERNICK: I'll make -- I'll make a push

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1 for it.

2 THE COURT: All right.

3 MR. CIRESI: Maybe counsel could do it
4 without writing, Your Honor.

5 MR. BERNICK: Well he's never liked that.
6 You notice that? He's never liked that.

7 Let's talk about defending smoking. Defending
8 smoking was part of what we did in response to the
9 controversy, and you've often heard the statement
10 that appears in the Frank Statement, and I'm going to
11 go back to the Frank Statement, that appears right
12 here, "We believe the products we make are not
13 injurious to health."

14 We have also heard that that statement was
15 changed, that we stopped making that assertion. And
16 Dr. Appleton testified from the stand on what we
17 would say today, and what we would say today focuses
18 not on public health policy, and it doesn't focus on
19 making statements that cigarettes are not injurious,
20 it focuses on gaps, what it is that is still not
21 known. Why does that make a difference to us? Does
22 it have litigation significance? Yes. Does it have
23 regulatory significance? Yes. It also has product
24 design significance. Unless we can answer some of
25 those gaps, it is very, very difficult to make a

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1 major change in a product design that we can say has
2 real health significance, and that's a problem that
3 is very, very real to us.

4 But whatever our position is on smoking and
5 health, it was a position that was taken in response
6 to a public issue. It was based upon public fact.
7 Every one of the facts that Dr. Appleton told you
8 about were public, and it was stated publicly, every
9 one. And what does that tell you? What it tells you
10 is when you look to this part of the Frank Statement
11 and when you look to this part of our activities,
12 what does it really mean? What's the significance of
13 it? It means that this is an issue that a lot of
14 people are talking about, and we have a perspective
15 that may be a very unique perspective and may be
16 driven by all kinds of motives, but we are
17 participating in that public discussion based upon
18 the same information, the same public facts. Those
19 are the facts that drive our position and that tells
20 you about the impact on the marketplace.

21 What is the impact on the marketplace? What
22 you've seen, and Mr. Bleakley has talked to you about
23 it, is public rejection. Our position has not been
24 accepted. It's not been accepted for a very, very,
25 very long time. No Surgeon General report accepts

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1 it, no medical society accepts it. Who are the
2 doctors that accept it? So -- and that's the nature
3 of a public position, is that anybody can challenge

4 it, anybody can attack it, anybody can criticize it,
5 and they have.

6 What is the impact of all of these statements
7 beyond this courtroom where they're picked up and
8 held out for derision and scorn? What's the real
9 impact of it in the marketplace? There is no impact
10 of it in the marketplace. What scientific
11 development has been held up because somebody from
12 The Tobacco Institute says something about causation?
13 Why is it being injected here? Why is it so critical
14 for its impact on the marketplace? It's here for
15 only one reason, it's here to create an image and a
16 profile of intransigence. That's why it's being
17 injected into these proceedings. They want you to
18 fault us on that. They don't want you to fault us on
19 what really happened to the product, what really
20 happened to the research, what really happened to the
21 marketplace and what really happened to the consumer,
22 they want to get you excited by the fact that we've
23 got this unique position. And every time you come
24 back to that position, you ought to ask yourselves:
25 Why? Why does it matter? Why am I focusing on it?

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1 We stand by it, we explained it to you, but let's
2 appreciate why it's here and what it does.

3 What is the impact on the consumer? The Surgeon
4 General has never bought our position, and yet it is
5 the Surgeon General's warning that by act of Congress
6 has got to appear on every pack of cigarettes. What
7 does the consumer see? The consumer sees the Surgeon
8 General's warning.

9 Now have we used that warning and relied upon
10 that warning? Yes, we did. That was the warning
11 that the Surgeon General and our Congress crafted,
12 and that's the warning that we put on. Could we have
13 put another warning on? There are issues about that,
14 but for present purposes let's say yes. We accepted
15 what the Surgeon General had to say. Now we might be
16 criticized for that. Maybe we should have said more.
17 It was our judgment that Congress and the public
18 health authorities of the United States had made a
19 statement about what should be done, we were going to
20 do it, and that's the judgment that we made. And
21 maybe if somebody would today say something more
22 should be said, but met me ask you this, and you're
23 going to have to decide this: Does the fact that we
24 relied upon the Surgeon General warning, does that
25 constitute a fraud on our consumers? Is it

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1 fraudulent to rely upon the warning and to put it on
2 the packs of cigarettes? Are you going to find that
3 the state statutes of Minnesota were violated in a
4 fraud and deception because we used the Surgeon
5 General's warnings and we felt that they were
6 sufficient because they were what was told to us?
7 The claim in this case is consumer fraud. Does that
8 support a fraud?

9 Now I want to get to the bottom line, and for
10 the first time I will meet my time deadline.

11 THE COURT: It will be quite a treat.
12 (Laughter.)

13 MR. BERNICK: Okay, that's -- now I've
14 really got an incentive.

15 Let's get to the bottom line. What do you say
16 about the special duty in the Frank Statement? We
17 did meet the goals, the basic scientific goals, the
18 basic product design goals that were implicit in the
19 Frank Statement. Did we always do a great job? No,
20 I'm not going to tell you that. There are problems.
21 There are things that were said and done that I'm not
22 going to stand behind.

23 But they can't obscure what the industry as a
24 whole accomplished. That's not fair. If you want to
25 reach a fair verdict and a fair appreciation of the

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1 conduct of an entire industry over a 40-year period
2 of time, you got to take all of it. You take the
3 bad, take the things that have been wrong or they
4 were poor ideas, and you take the good and the things
5 that we have accomplished and what we've been shown
6 to achieve. And I think if you separate out and
7 weigh in your own minds the value and basic things
8 that were achieved, this industry has done a lot of
9 good things.

10 Now we're selling a product that many people
11 hate and we're selling a product that is risky, but
12 it's a product that's a lawful product, and we should
13 be judged in the context of this industry for how it
14 is that we responded to the basic problems that arose
15 in the early 1950's, and that response was
16 substantive and it accomplished good and real things,
17 even though in the process, God knows, there were
18 some things that were done that we would prefer, with
19 the benefit of hindsight, were not done. Reach a
20 fair verdict on that issue. Weigh and balance all of
21 the facts and let us know what the result is.

22 What about antitrust? We preyed on one another.
23 I can show you the charts that had the market shares
24 just coming down. Brown & Williamson today has 16 or
25 17 percent of the market. We're on a decline. We

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1 bought American Tobacco in 1995. They used to be
2 number one and they were so shrunken in size that
3 Brown & Williamson bought them, and we're still going
4 down. I think we had a total in 1996 of about 700
5 million dollars in profits on cigarettes across the
6 whole country. This is a competitive market. We are
7 the testament to the competitive nature of the
8 market. Don't tell us that it's cozy. We haven't
9 seen the warm and friendly feeling in this industry.

10 What about the consumer? To go back to that
11 1989 Surgeon General's report, you can pay a lot of
12 attention to what people say about consumers and what
13 they've known and what they've done and what the

14 impact of the industry would be, but you judge things
15 by the actions that were taken, and since the 1950s
16 and then accelerating in 1964, tens of millions of
17 people have voted with their feet. They knew enough
18 to make the decisions that had to be made in their
19 own minds to quit, and they quit without nicotine
20 patches or nicotine aids, they quit on their own. We
21 didn't need this case to bring to their attention
22 information sufficient for them to make a judgment.
23 They had that information. These are common-sense
24 decisions. Smoking is risky. Once you start, it's
25 hard to quit. What has changed those basic

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1 common-sense propositions? Why do we need this case
2 to tell people what it is that was sufficient in
3 their minds so they quit in droves, that led to the
4 revolution that was described by Mr. Bleakley in
5 1964? And we've seen the curves, how, if the trend
6 had continued, they would have gone like this and how
7 we've gone down. A literal revolution in public
8 health and culture.

9 You really have to ask yourself: Isn't that the
10 best litmus test of what the impact of all this
11 profusion of information is on the consumer, what
12 people have actually done in their real, practical
13 lives?

14 And my last couple statements are about BATCo.
15 BATCo is a British company. I represent Brown &
16 Williamson, it includes American, and I represent
17 BATCo. And the reason I want to raise BATCo is that
18 BATCo is actually not on this chart. BATCo didn't
19 sign the Frank Statement. BATCo, in terms of its
20 presence in the United States, they haven't even told
21 you that they sold enough cigarettes in the United
22 States to even matter. And where is the
23 representation that BATCo ever made to a consumer
24 here in the state of Minnesota? You can't find it.
25 BATCo is not on the chart.

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1 BATCo, however, did do certain things that have
2 come before you. They did the biological research
3 that was state of the art, they did the nicotine
4 research and they sponsored the nicotine research.
5 When you think about BATCo in this case, you think
6 about the role that they played, think: Has anybody
7 ever said that BATCo's research was not state of the
8 art? Has anybody ever said that BATCo's research was
9 flawed? And has anybody ever said there was an
10 important and critical BATCo research that was just
11 not in the public domain? In fact, BATCo published
12 extensively. So judge BATCo for its role and judge
13 Brown & Williamson here in the United States industry
14 for what it actually accomplished over time.

15 And I thank you very, very much for your
16 patience.

17 THE COURT: You didn't quite make it,
18 counsel, but it's close.

19 (Laughter.)
20 THE COURT: We'll recess, reconvene at --
21 we'll recess for one hour, reconvene at 10 minutes to
22 2:00.
23 THE CLERK: Court stands in recess.
24 (Recess taken.)
25

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1 AFTERNOON SESSION.
2 THE CLERK: All rise. Ramsey County
3 District Court is again in session.
4 (Jury enters the courtroom.)
5 THE CLERK: Please be seated.
6 THE COURT: Counsel.
7 MR. MONICA: May it please the court.
8 Good afternoon, ladies and gentlemen.
9 (Collective "Good afternoon.")
10 MR. MONICA: I thought I'd start by
11 reintroducing myself. My name is John Monica. You
12 haven't seen much of me at this trial. I represent
13 Lorillard Tobacco Company, and I'm with the Shook,
14 Hardy & Bacon law firm in Kansas City, Missouri.
15 David Martin and I, with the Doherty Rumble law firm,
16 have been here for these some 15 weeks of trial. I
17 think this is the 73rd day of evidence testimony.
18 We've been here every day, as I said. We haven't
19 done very much because there hasn't been very much
20 evidence against my client, Lorillard Tobacco
21 Company. But I would like to talk to you for a few
22 minutes today about my client. We've agreed to keep
23 my remarks short so that others will have more
24 opportunity to speak, so I anticipate speaking to you
25 for a half hour or 45 minutes, something like that.

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1 I'd like to start out by reminding the jury of a
2 jury instruction that you heard yesterday, and that's
3 instruction number 20, and that talks about the jury
4 having an obligation, you having an obligation to
5 keep the defendants separate in your considerations,
6 and I'll read that instruction for you. "There are
7 multiple defendants in this lawsuit. Answer the
8 special questions as to each defendant as though the
9 lawsuits are being tried separately. Each defendant
10 is entitled to a fair and separate consideration in
11 this case and is not to be prejudiced by your answers
12 with respect to the others. These instructions
13 govern the case as to each defendant so far as they
14 apply to that defendant."
15 Now who is Lorillard? What is Lorillard Tobacco
16 Company? That is my client. You've heard very
17 little evidence about my client, and I thought I'd
18 start by reminding you who we are. We have seven --
19 seven percent market share. We're putting up on the
20 screen one of the demonstratives that were -- that
21 was entered. As you can see during the period of
22 1954 through 1994, Lorillard has pretty well
23 maintained a seven percent market share in the

24 overall tobacco industry. This is also shown by a
25 second demonstrative that you saw earlier today, and
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1 that is now up on the screen also. As you can see,
2 over the years Lorillard has been around seven
3 percent. I don't know if you can see the yellow
4 highlight, but it's the line -- Craig, if you would
5 just kind of trace that line for the jury -- that is
6 the Lorillard line over the years, around seven
7 percent. As others have risen and fallen, we have
8 maintained some consistency, some constancy, if you
9 will, around seven percent.

10 Our three major brands are Newport, Kent and
11 True. We have, of course, sold our products in
12 Minnesota, and we have, of course, earned profits on
13 those products sold here. And there was another
14 visual aid, if you will, that explained that to the
15 jury, and that was put in through the plaintiffs'
16 expert, Mr. Much. We have up on the screen now a
17 visual that shows what Lorillard has sold in the
18 state of -- in the state of Minnesota, and under
19 operating profits, as you can see, for a total of 42
20 years, from 1954 through 1996, the total sales -- or
21 pardon me, the total operating profits were
22 approximately 147 million dollars over that 42-year
23 period in the state of Minnesota. That averages out
24 to some 3.5 million dollars a year. But you must
25 remember, as was also explained to you during Dr.

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1 Much's testimony, that included within these figures
2 are excise taxes collected by Lorillard that has to
3 be paid over to government entities. And also, this
4 is a pre-tax figure; Lorillard's income taxes have
5 not been paid out of this figure. So we -- when you
6 consider the excise taxes and the income taxes, this
7 figure would be quite a bit less than is shown to you
8 on the screen.

9 Now as you know, this case has been what we
10 refer to as a document case. You've seen many
11 documents. You've heard some testimony on the
12 documents. But basically plaintiffs' technique
13 have -- has been to put a witness on the stand, to
14 put a document on the screen, to read from the
15 document while the witness says yes, I see that, yes,
16 I see that. Do you see that? Yes, I see that. Over
17 and over again that has been the technique used with
18 the witnesses.

19 Now the defendants have produced many, many
20 documents in this lawsuit. There was testimony of
21 some 30 million pages of documents being in a
22 depository right here in the Twin Cities area.
23 Lorillard has produced approximately 1.8 million
24 pages of documents in this lawsuit. If you were to
25 take those documents and stack them one on end -- one

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1 on top of the other, they would be 666 feet high.
2 That's the equivalent of a 66-story office building.
3 That's how many documents Lorillard has produced in
4 this lawsuit.

5 What have plaintiffs put in evidence against
6 Lorillard? Here they are. These are the documents
7 in evidence against Lorillard. This is it. Out of a
8 66-story office building, these are the Lorillard
9 documents. And of these, half of these documents
10 pertain to one subject, half of these documents
11 pertain to our nicotine augmentation project which I
12 will discuss with you. But that's not all. Of these
13 documents, how many were put in through witnesses?
14 These are the documents, ladies and gentlemen, that
15 were put in through witnesses that you've heard
16 testimony on. These few documents. It's about a
17 half inch of paper. These documents were put in on
18 document day where plaintiffs just put into evidence
19 documents, and you read them during document day. So
20 here's document day, here's testimony. This is it on
21 documents against Lorillard in this case.

22 I think you should keep that in mind. I think
23 it's very relevant. After some 73 days of trial, 15
24 weeks, these are the documents in evidence against
25 Lorillard. We additionally put some in, but those

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1 are the documents that the plaintiffs put in against
2 Lorillard.

3 Now in addition, you may remember that I told
4 you in my opening that you probably would hear from
5 our CEO, Dr. Spears. Dr. Spears was scheduled to
6 come in and testify at that time. The court had
7 ordered that the plaintiffs be permitted to select
8 one live witness from each defendant, and this -- and
9 the plaintiffs selected Dr. Spears. And we complied
10 and we said yes, we will bring him in live for you to
11 put on the stand. He was scheduled to come in. He
12 was eighth on the list at the time I made that
13 opening statement. But he did not come in and
14 testify because plaintiffs struck the -- struck him
15 from their list. They decided not to call Dr.
16 Spears, even though we were going to bring him in.

17 In addition, plaintiffs took Dr. Spears'
18 deposition for some three days, over 700 pages of
19 deposition on video. They elected not to play his
20 deposition either. So you have seen nothing, heard
21 nothing from Dr. Spears.

22 In addition, plaintiffs took the deposition of
23 several other Lorillard employees --

24 MR. CIRESI: Your Honor, I'm going to
25 object to depositions that were taken. It's

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1 irrelevant to closing arguments. It's not evidence.

2 THE COURT: Just discuss the evidence that
3 was presented, counsel, please.

4 MR. MONICA: Ladies and gentlemen, we

5 considered the evidence that was put in on direct
6 testimony about Lorillard and about Dr. Spears, we
7 looked at the documents, the few documents that were
8 put into evidence, and we considered that it was
9 plaintiffs' burden of proof to prove their case
10 against Lorillard, if it had any, and they didn't do
11 it, and we decided not to call Dr. Spears, not to
12 call any witnesses, because plaintiffs had the burden
13 of proof and they hadn't met their burden of proof.
14 That's why Dr. Spears isn't here. That's why no
15 Lorillard employee has come in.

16 Now on the burden of proof, I'd like to read to
17 you an instruction that the court has given you,
18 instruction number five. This will tell you what
19 plaintiffs must establish to prove a case against
20 Lorillard or any defendant. And again, it's up on
21 the screen. "The burden of proof is on the
22 plaintiffs, that is, the state of Minnesota and Blue
23 Cross and Blue Shield of Minnesota, to prove every
24 essential element of each of their claims by the
25 greater weight of the evidence.

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1 "Greater weight of evidence means that all of
2 the evidence, by whomever produced, must lead you to
3 believe that it is more likely that the fact is true
4 than not true. If the evidence does not lead you to
5 believe that it is more likely that the fact is true
6 than not true, then the fact has not been proved by
7 the greater weight of the evidence."

8 Ladies and gentlemen, I submit to you that the
9 plaintiffs have not met this burden of proof as to
10 Lorillard. That is why we did not bring in any
11 witnesses. And we were not required to do so. We
12 were content, ladies and gentlemen, to let you look
13 at these few documents, to let you remember what the
14 testimony was, and for you to judge Lorillard by the
15 actual evidence in this case.

16 Now let's take a look at some of that evidence
17 as it pertains to Lorillard. You will recall that
18 Professor Jaffe was brought in to you. He is
19 plaintiffs' antitrust expert. And Professor Jaffe
20 had this conspiracy theory and had, I believe, four
21 prongs that he -- he talked to you about. And I'm
22 going to discuss some of those prongs with you.

23 First of all, Professor Jaffe started out with
24 two Hill & Knowlton documents that he said were the
25 genesis of a conspiracy, that set out the blueprint

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1 of the conspiracy, if you will. And let me read to
2 you from the trial testimony of Professor Jaffe on
3 this subject. Quote, "Well these two documents taken
4 together essentially provide a description of the
5 events -- of the events in -- beginning in December
6 of 1953 at which the defendants agreed to conspire,
7 and actually provides an explanation in significant
8 ways of why -- of why they did it as well as in
9 effect a blueprint that was significantly carried out

10 over the subsequent several decades." That was one
11 of Dr. Jaffe's theories, that these Hill & Knowlton
12 documents were the genesis of a conspiracy and set
13 out the blueprint.

14 Well let's take a look at these two documents
15 very quickly. The first document, which we now have
16 up on the screen, is dated December 15, 1953. This
17 document is not a Lorillard document, it did not come
18 from Lorillard's files, in fact the testimony is it
19 did not come from any of the defendants' files,
20 instead it came from the files of probably Mr. Hill,
21 one who authored the document. If you look at the
22 first page of the document you'll see the names of
23 the companies that were present. If you look at the
24 last page of the document you will see the names of
25 the companies at the meeting, and you will see that

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1 Lorillard Tobacco Company was not even at this
2 meeting at which they contend the genesis of a
3 conspiracy and the blueprint of a conspiracy was set
4 out.

5 If you look at the second Hill & Knowlton
6 document also, that's now being placed up on the
7 screen for you, Trial Exhibit 18904, this document
8 was a second in the Hill & Knowlton documents.
9 Ladies and gentlemen, I urge you to look at this
10 document when you go to the jury room to deliberate.
11 You will not find any reference to Lorillard in this
12 document, the second Hill & Knowlton document.

13 So what do we have, ladies and gentlemen? We
14 have Professor Jaffe's testimony that these are key
15 conspiracy documents. They did not come from
16 Lorillard's files. They do not show that Lorillard
17 was present. And on their face there is no mention
18 of Lorillard.

19 Now another aspect of Professor Jaffe's
20 conspiracy theory is that the companies conspired, if
21 you will, to put the lawyers in charge of research so
22 that the lawyers could try to hide the research.
23 Well Mr. Bernick discussed with you very frankly the
24 lawyer involvement in the research. Lawyers did play
25 a role in the company business. As you can imagine,

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1 it's a highly regulated business, and the attorneys
2 did provide legal advice on various subjects. But
3 here's a document that the plaintiffs have shown to
4 you over and over again, and it is a Lorillard
5 document. This is dated April 21, 1978, and this is
6 the document written by former Lorillard CEO Curt
7 Judge. And here -- here's the portion of the
8 document that plaintiffs have shown you over and over
9 again. It says, "We have again 'abdicated' the
10 scientific research directional management of the
11 Industry to the Lawyers with virtually no involvement
12 on the part of scientific or business management side
13 of the business."

14 This is the document, one of the documents that

15 Professor Jaffe says shows a conspiracy by the
16 companies to agree to put the lawyers in control.
17 Well let's look at what this document says. If you
18 go a little bit further, in the second paragraph,
19 here's what the document says: "Lorillard's
20 management is opposed to the total industry future
21 being in the hands of the Committee of Counsel."
22 Let's look at the third paragraph. "We, Lorillard,
23 require a meeting of the Committee or a
24 reconstitution leading to regular meetings to give
25 policy direction to Industry research." Let's look

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1 at the last two paragraphs of this document. "The
2 Committee will not," I emphasize, "will not report to
3 Committee of Counsel but to our own corporate CEOs."
4 And the closing paragraph, "Immediate action is
5 imperative."

6 I ask you, ladies and gentlemen, are these the
7 words of a man who wants to put the attorneys in
8 control of science? Mr. Judge, the former CEO, is
9 strenuously objecting to attorneys playing a role in
10 science. As Mr. Bernick has pointed out to you,
11 there was a proper role for attorneys given the
12 antitrust threat from the government, but Mr. -- Mr.
13 Judge, our CEO, is complaining about that and saying
14 something has to be done. This is directly contrary
15 to Professor Jaffe's conspiracy theory. Our CEO is
16 not saying let's put the attorneys in control, he's
17 complaining about attorney involvement.

18 Now let's look at another aspect of the alleged
19 conspiracy. Here Professor Jaffe said that there was
20 a conspiracy not to do in-house biological research
21 with live animals. Now you see what -- see what
22 they're doing with this theory? If you define
23 something so narrowly, you can say, well, the only
24 people we're going to look at are blonde-headed,
25 blue-eyed women under five feet tall who are wearing

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1 red shoes, and if you define it closely enough, you
2 define something that -- that you can find any time
3 you define a certain set. What they're doing is
4 they're trying to define the conspiracy so narrowly
5 that they can find a conspiracy. They're trying to
6 say there's a difference between in-house biological
7 research on live animals or animal parts, if you
8 will, and the outside biological research. And
9 here's what Professor Jaffe said about Lorillard.
10 And again, we're looking at the trial transcript,
11 page 8160. Quote, "Lorillard did not pursue the
12 long-term development of a safer cigarette."

13 What prompted Professor Jaffe to make that
14 statement in his trial testimony? He had just
15 reviewed Lorillard document number 14020, and he was
16 questioned after that, and that's when he made that
17 statement. Well let's take a look at that Lorillard
18 document that prompted Professor Jaffe's statement.
19 That document has now been put up on the screen for

20 you. The title is "A Review of Animal Studies
21 Conducted at Bio-Research Consultants and the
22 Sloan-Kettering Memorial Institute" and it was
23 written by Dr. Spears. Now let's turn to the first
24 paragraph of this letter which is dated May 25, 1966.
25 I'm going to read the first paragraph because I think
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1 you'll find it very probative in this case.
2 "During the past decade, the Research Division
3 of P. Lorillard Company, Inc., has been investigating
4 the tumorigenic properties of cigarette smoke
5 condensate toward mouse epithelium through
6 cooperative studies with Dr. Wynder, of
7 Sloan-Kettering Memorial Institute, and on a
8 consulting basis with Bio-Research Consultants, Inc."
9 Look at the fourth word in that sentence, the first
10 sentence, "During the past decade," 10 years of work,
11 a decade of work, and Professor Jaffe had the
12 audacity to say we have not done any long-term work.
13 And look who the work is being done with: Dr.
14 Wynder. You will recall Dr. Wynder. Dr. Wynder
15 was -- is one of the premier smoking-and-health
16 scientists in the field. He was the gentleman who
17 did the original work that led to the controversy
18 over smoking and health. He is a very respected
19 scientist. And what did Lorillard do instead of
20 trying to hide? Lorillard went out and retained Dr.
21 Wynder, the most preeminent scientist it could find,
22 to work with it on its biological research.

23 Now I submit to you if you were trying to hide
24 your research, you sure wouldn't do this. And the
25 research was being done at the Sloan-Kettering
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1 Institute. You've heard that mentioned, too. That's
2 one of the preeminent institutes, cancer research
3 centers in the country.
4 Now let's look at what Dr. Scheffman, who was
5 our antitrust expert, let's look at what he had to
6 say about this research where Dr. Spears, our CEO,
7 and Dr. Wynder were collaborating and getting some
8 research done on biological issues. And I direct you
9 to transcript page 14343. Here's what Dr. Scheffman
10 says. "I can't imagine a better conjunction of
11 scientists than Dr. Spears and Dr. Wynder, which is
12 done outside. You have what's commonly acknowledged
13 to be the leading scientist in the industry, Dr.
14 Spears, head of Lorillard, engaging in a long-term
15 research project with Dr. Wynder as one of the
16 leading authorities in the world." So here you have
17 one of the leading in-house scientists, our CEO, Dr.
18 Spears, with one of the leading scientists in the
19 world on smoking and health doing research together
20 through the Sloan-Kettering Institute, one of the
21 premier institutes. And I ask you: Would you do
22 this if you were trying to cover -- cover up
23 research? Would you do this if you were trying to
24 hide research? Would you do this if you were afraid

25 of a bad result? The answer is, obviously, no. The
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1 conspiracy theory does not make any sense.
2 Now let's take a look at some research that
3 Lorillard did do on one particular area. I told you
4 that half of these documents, even though it's only
5 two and a half inches of paper, but a full half of
6 these documents pertain to our nicotine augmentation
7 program. Now I'm going to discuss that program with
8 you now. Now you'll recall that Dr. Townsend, with
9 Reynolds, talked about -- and Mr. Bernick explained
10 the public authority suggestion that a need is at
11 hand to develop a better low tar cigarette, because
12 as you pull tar down through general reduction,
13 nicotine comes down also. They go together.
14 Nicotine and tar, when you pull one down, the other
15 one comes down. And what was happening is in these
16 low tar cigarettes, sure, the tar was coming down,
17 but they weren't tasting very well. And the public
18 health authorities suggested that if people are going
19 to smoke, something should be done to give them a
20 better-tasting low tar cigarette, and they suggested
21 that nicotine be held at a medium level while pulling
22 the tar down. This nicotine augmentation program, or
23 we call it NAP, N-A-P, was in direct response to the
24 public health authorities' suggestions.

25 And in that regard let me put up another
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1 document, this is a Lorillard document, and ask you
2 to take a look at that. It's a May 4, 1976 memo from
3 Dr. Minnemeyer of Lorillard to Dr. Schultz of
4 Lorillard, re, "Nicotine Augmentation Project (NAP),"
5 Trial Exhibit 10015. I'm just going to read the
6 first sentence to you. "Recommendations from health
7 oriented agencies and pressure from competitive
8 companies make it imperative that Lorillard develop a
9 flavorful cigarette delivering lower tar while at the
10 same time delivering a level of nicotine higher than
11 could be obtained normally by conventional cigarette
12 construction."

13 Going back to the very first few words,
14 "Recommendations from health oriented agencies...."
15 This is a clear reference to such people as Dr.
16 Wynder, and you remember Dr. Russell was mentioned,
17 and the National Cancer Institute, such agencies and
18 people as that.

19 The nicotine augmentation program at Lorillard
20 was purely a research program. We -- we tried
21 various things. We tried experimenting with filters,
22 tried adding nicotine, tried filtration, we tried air
23 dilution, a number of different things, and that's
24 what these NAP documents talk about. They talk about
25 the various types of studies that we did, the

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1 literature reviews, the experimentation we did, to
2 try to come up with a better low tar cigarette that
3 smokers would use. But we were unsuccessful. Try as
4 we might, we were not able to come up with a
5 cigarette that was acceptable to smokers through this
6 process, so eventually this program was abandoned.

7 Now I'd like now to switch to another subject
8 because I think I've given you a pretty good
9 overview, given the time that I have, of some of the
10 scientific issues as they apply to Lorillard. But
11 another key issue in this case is youth smoking, of
12 course. And you'll remember you didn't see many
13 documents from Lorillard on youth smoking. The key
14 document that plaintiffs liked to show to you is
15 the -- is one written by Ted Achey where he says the
16 base of our business is the high school business as
17 far -- or high school student as far as Newport
18 cigarettes. This is the key document. There was
19 another document that mentioned immature smokers and
20 there was a third document where someone at Lorillard
21 reported statistics on underage smokers, just put it
22 in a report -- took a government report, took part of
23 that data and put it in a report and gave it to
24 others. But those are the documents that we're
25 talking about as far as Lorillard and youth smoking.

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1 This -- this Achey document is the centerpiece
2 of plaintiffs' evidence against Lorillard on youth
3 smoking, such as it is, and it's not much evidence.
4 And I'm going to go over that document with you now.
5 If you take a look at this document, which is up on
6 the screen, it's dated August 30, 1978. You can see
7 that it was written by Mr. Achey to Mr. Judge, and at
8 the time that is shown right at the top Mr. Achey was
9 in field three, and at the bottom of the document
10 you'll see that that was in Mt. Laurel, New Jersey.
11 So this is a field man out in the field, not at --
12 not a marketing man, a field man writing about his
13 observations. Well let's take a look at the specific
14 paragraph that plaintiffs like to key in on, and this
15 is the third paragraph. Here's what he said. "The
16 success of Newport has been fantastic during the past
17 few years. Our profile taken locally shows this
18 brand being purchased by black people (all ages),
19 young adults (usually college age), but the base of
20 our business is the high school student."

21 This is a field man making a statement on his
22 observations based upon -- look at the sentence, "Our
23 profile taken locally...." This is not a marketing
24 plan, this is observations by a field man.

25 I think, ladies and gentlemen, it should tell

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1 you a lot if plaintiffs have to pull up a document
2 written by someone out in the field who's calling on
3 stores to try to say that it was Lorillard's plan and
4 design to sell Newport cigarettes to young people,
5 underage people. Why didn't they bring in to you a

6 formal marketing plan for Newport so you could see
7 who the target audience is for Newport? They didn't
8 do that. We did.

9 Want to show you a couple of documents, a couple
10 of formal marketing documents pertaining to Newport
11 right now. First is Trial Exhibit 10167. This the
12 the Lorillard five-year marketing plan for the
13 periods of 1977 through 1981. It was written in
14 September of 1977. Please note that this document
15 covers the very year that Mr. Achey wrote his
16 document. Mr. Achey wrote his document in 1978, this
17 document covers that, plus a five-year period.

18 If we turn to page 23 of this document, it
19 pertains to Newport. You can see up in the upper
20 left-hand corner this section pertains to Newport.
21 Now let's look at what is said. This is the formal
22 marketing document. Let's look at what is said about
23 the target audience for Newport. "The target
24 audience for the parent brand," and that's Newport,
25 "will continue to be smokers 21 to 44 in the core

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1 area, with emphasis on young adults, blacks, and
2 women, who have all been important sources of
3 business in the recent period of growth."

4 This is a clear statement of the target audience
5 for Newport, smokers aged 21 through 44. And not
6 only that, it recites that these people have been
7 important sources of growth, not only -- not only are
8 they now, but they have been in the past.

9 But that's not all. Let's look at a second
10 document, a second document that we're bringing to
11 you, not the plaintiffs. This is Exhibit SSP000002.
12 This is the 1982 Newport brand plan. This entire
13 document pertains to Newport and it was written some
14 four years after Mr. Achey wrote his document. Let's
15 take a look at what this formal document has to say
16 about the target audience for Newport cigarettes.
17 Again, this -- this document is not numbered, but
18 we're using the Bates number and we're looking at the
19 Bates number page that ends with 914, Roman numeral V
20 at the top of the page, "1982 Objectives and
21 Strategies" for the parent, which is Newport, the
22 strategies under subparagraph A, the second
23 paragraph, and I'm going to read that one to you,
24 "Overall, utilize media vehicles which have above
25 average coverage against the target audience (young

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1 adult smokers, 21 through 24) to maximize
2 effectiveness and efficiency." Again, a formal
3 marketing plan pertaining to Newport that clearly
4 says who the target audience is. Clearly people
5 above the age of 21.

6 But in addition I'd like to point out to you
7 that Lorillard -- you've heard something about the
8 industry advertising code where the industry adopted
9 a code to conduct itself so it would not sell to
10 underage smokers? Well in addition, Lorillard

11 adopted its own code in-house, and it's -- it's
12 called the Lorillard Marketing Code, and we have that
13 up on the screen. And it pretty much follows the
14 industry code, but I wanted to point out to you that
15 this code did exist over the years -- number of years
16 when Lorillard did business, and it guided Lorillard
17 in its conduct.

18 Let's look at the second paragraph of this code
19 because I think it's very important. "Cigarette
20 smoking is an adult custom. Children should not
21 smoke. Laws prohibiting the sale of cigarettes to
22 minors should be strictly enforced. The cigarette
23 manufacturers advertise and promote their products
24 only to adult smokers. They support the enactment
25 and enforcement of state laws prohibiting the sale of

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1 cigarettes to persons under the age of 18."

2 This was in addition to the -- to the national
3 advertising code. This was Lorillard's own
4 advertising code.

5 Now let's look at the second page here entitled
6 "Cigarette Advertising Code." And you can see the
7 numbered paragraphs. Now I'm not going to read all
8 those paragraphs to you, I'm just going to touch on a
9 few of them to give you a flavor for what this says.
10 Paragraph number one, "Cigarette advertising shall
11 not appear, (a) in publications directed primarily to
12 those under 21 years of age, including school,
13 college or university media," et cetera.
14 Subparagraph (b) cigarette advertising shall not
15 appear on billboards located within 500 feet of any
16 elementary school, junior high school or high school
17 or any children's playground." Again, I'm not going
18 to read each one of these paragraphs. Paragraph
19 number three, "No one depicted in cigarette
20 advertising, shall be or appear to be under the age
21 of 25 years." Paragraph seven, "No sports or
22 celebrity testimonials shall be used directed -- that
23 have a special appeal to persons under the age of
24 21." I think you can see that this is a very
25 comprehensive advertising code implemented by

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1 Lorillard.

2 Turn to the effects page. And I won't belabor
3 this, but this sets out sampling procedures that
4 Lorillard is to use, and again it talks about not
5 sampling people under the age of 21, not doing
6 anything to appeal to people under the age of 21.

7 Now then the question is: Did Lorillard follow
8 its own advertising code? The answer is yes. We
9 have put into evidence six documents that we hope
10 demonstrate this to you. These are six documents
11 that we selected that pertain to a 10-year period of
12 time. Now I'm not going to go over all six
13 documents, but I've selected two of them that I think
14 will make our point. First of all, I'm putting up a
15 document dated February 18, 1976. Now these

16 documents are in evidence. It was written by the
17 assistant brand manager for Old Gold cigarettes, Mr.
18 Robbins. It was written to a Dr. John Sherman, who
19 is an assistant professor of english right here in
20 Minnesota at Minnesota -- Moorhead State College.
21 Evidently Mr. Sherman had asked for copies of a
22 publication called Folksong U.S.A., and Mr. Robbins
23 was trying to comply with the request. But here's
24 the extent that we went to, that Mr. Robbins went to
25 to comply with the advertising code and not to appeal

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1 to young people, and I quote from the last paragraph,
2 "The limited edition of the book was prepared with
3 OLD GOLD cigarette advertising copy on the rear
4 cover. As you may know, it is Lorillard's practice
5 to avoid directing the appeal of its cigarette
6 advertising to young people, and not to advertise on
7 college campuses. Accordingly, we have taken the
8 liberty of removing the back cover of the editions
9 being forwarded to you. We are confident this
10 alteration will not detract from the usefulness to
11 your students of the editions." To be safe, to make
12 sure that this had no appeal -- that we weren't
13 advertising or doing anything to encourage these
14 students to smoke Old Gold cigarettes, the last page
15 was removed.

16 Now the second document I would like to show to
17 you is being put up on the screen now, and again this
18 is in evidence. This is dated May 25, 1966, it's
19 written 10 years before the document I've just showed
20 to you, and I'm going to read to you from this
21 document. It pertains to Lorillard. "Mr. Kilian
22 informed the agency that P. Lorillard Company has
23 sold off the Kent 60 second participation in the June
24 5 Ed Sullivan show because of an appearance that
25 evening by the Beatles. Because the client sold off

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1 the minute directly to Clearasil, a credit will be
2 requested from the CBA -- CBS network."
3 Do you see what happened here? Lorillard pulled
4 its advertising, did not advertise on that Ed
5 Sullivan show because the Beatles were appearing on
6 that show. And you all know who the Beatles were,
7 they're more of my era, but they were perhaps the
8 hottest group -- other than the King, Elvis -- they
9 were the hottest group around at that time. And for
10 a company to pull its advertising on that show so it
11 wouldn't appeal to children -- if Lorillard wanted
12 to, it could have appealed to millions and millions
13 of children on one program, but yet it didn't do so.
14 Clearasil, the complexion -- the acne company, they
15 took the spot. They were glad to get it. But
16 Lorillard gave up the spot, sold the spot, and did
17 not use it.

18 Ladies and gentlemen, I submit to you that there
19 is no evidence that Lorillard tried to appeal to
20 youth. In fact, I think there is much evidence to

21 the contrary. I think we've complied with our
22 obligations. We have sold a legal product, we have
23 sold it in a legal manner, and we have not attempted
24 to appeal to underage smokers.

25 Now in closing, let me mention another jury
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1 instruction, if you will. You're going to be asked
2 to consider whether or not punitive damages are
3 appropriate in this case, and that's jury instruction
4 number 48, and you need to consider that if you
5 decide punitive damages -- you need to consider
6 whether or not they're appropriate, and I submit to
7 you that they are not appropriate, they are not
8 appropriate against Lorillard or any of these
9 companies. And if you read that instruction, you
10 will see what your duty is when you're considering
11 these punitive damages. And we have it up on the
12 screen. You must find by clear and convincing
13 evidence -- now this is a much higher standard than
14 the ordinary jury instruction that I read to you
15 earlier, more likely -- more likely than not, this is
16 by clear and convincing evidence. And this
17 instruction defines clear and convincing. In the
18 second paragraph it says, "When I say clear and
19 convincing evidence, I mean the evidence must lead
20 you to conclude that it is highly probable that the
21 defendant acted with deliberate disregard for the
22 rights or safety of others. Put another way, the
23 evidence must produce in your minds a firm belief or
24 conviction that the defendant acted with deliberate
25 disregard for the rights or safety of others." This

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1 burden cannot be met by the plaintiffs. They cannot
2 show that Lorillard deliberately disregarded the
3 rights of anyone.
4 Ladies and gentlemen, you'll be -- you will be
5 asked to look at various jury instructions. You will
6 be asked to look at the special verdict forms. And
7 I'd like to give you some guidance with regard to my
8 client when you look at these forms. Those basic
9 forms will break down into three separate kinds of
10 forms, and I'm not going to go over each one of them,
11 but I'm going to give you some guidance that I
12 suggest that you follow due to the lack of evidence
13 against my client. The first type of form you
14 will -- you will see -- each form will have
15 Lorillard's name, again, and Lorillard will be listed
16 with a number of other companies. And the first type
17 of form you see will have "Yes" or "No" under that
18 form. Ladies and gentlemen, I submit to you that
19 each time you see this type of form and you have to
20 fill it out, you put a "No" next to Lorillard's name.
21 The second type of form you'll see will also
22 have Lorillard's name, but it will have a percentage
23 sign and it will talk about percentage of wrongdoing
24 or percentage of fault or however the instruction
25 reads. When you see this instruction, ladies and

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1 gentlemen, I suggest you put a zero next to
2 Lorillard's name.

3 The third type of form will also have
4 Lorillard's name on it, with others, and it will have
5 a dollar sign, and that will be talking about if
6 punitive damages should be awarded. And again,
7 ladies and gentlemen, based upon the evidence, I
8 think you should put a zero by Lorillard's name.

9 If you let this easy reference guide you, I
10 think you must conclude and you will conclude, based
11 upon the evidence, that Lorillard has done nothing
12 wrong. In fact, ladies and gentlemen, I am very
13 disturbed that the plaintiffs would take 73 days of
14 testimony, 15 weeks, have you sit here, and this is
15 all they put in on my client, and they would put my
16 client through this. I think this is an outrage for
17 them to do that, for them to have this lack of
18 evidence against my client and make us all sit here
19 and judge my client based upon this very slight
20 evidence. But that's exactly what they're making you
21 do.

22 And I know you will do your job. And I want to
23 say to you on behalf of my client that I appreciate
24 your patience, I appreciate your attention. You've
25 sat here for many weeks, and we know you will do the

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1 right thing.

2 Thank you very much.

3 THE COURT: Anybody?

4 MR. CORRIGAN: May it please the court.

5 Good afternoon.

6 (Collective "Good afternoon").

7 MR. CORRIGAN: I do have a voice, I just
8 haven't used it since January. So let me reintroduce
9 myself. I'm Mike Corrigan, and I, along with Jerry
10 Svoboda, represent B.A.T Industries P.L.C., a company
11 headquartered in London, England.

12 The last time I said that was back in January
13 when I introduced myself and Mr. Svoboda to you. I
14 haven't said a thing to you since. I didn't make an
15 opening statement on behalf of my client. I
16 occasionally made some objections, but that wasn't
17 speaking to you directly. And unlike all of the
18 other lawyers here, I did not conduct any examination
19 of any witnesses. And B.A.T Industries did not
20 produce or introduce any evidence during this trial
21 because I believed that it was unnecessary. So today
22 is my one and only chance to talk to you.

23 I'm going to talk to you about what there is
24 concerning my client that's in the record of this
25 trial, and I mean my client, B.A.T Industries.

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1 You've heard about British-American Tobacco, you've

2 heard evidence about it. Shorthand name for that
3 company, BATCo, or sometimes BAT has been used in
4 this trial. Like Brown & Williamson, BATCo is a
5 subsidiary of B.A.T Industries. Both those companies
6 are represented by Mr. Bernick, and he has already
7 addressed you. Now I may be a tad taller than Mr.
8 Bernick, but I'm a lot quieter, and so I'm going to
9 take a much shorter period of time to talk to you.
10 But what little time there is, I want to talk to you
11 about B.A.T Industries, what kind of company it is,
12 how it operates, and why plaintiffs have failed to
13 carry their burden of proof against my client.

14 Now like you, since January I've been here.
15 I've listened to the evidence. I've observed the
16 witnesses. In particular, as you might imagine, I've
17 been paying careful attention to see if any evidence
18 came in concerning my client. That proof never came.
19 We saw no evidence that matched up my client with
20 plaintiffs' claims in this case. And I think it's
21 useful and helpful if we go back to the beginning of
22 the trial for just a moment.

23 On January 20th, Judge Fitzpatrick read to you a
24 statement that had been agreed upon by the parties in
25 this case, and part of that statement described what

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1 plaintiffs' claims are, and one description was as
2 follows: "Plaintiffs claim that the defendants,
3 contrary to their promises, misrepresented and
4 concealed damaging evidence that they knew about the
5 health hazards of smoking." Ask yourselves: Did
6 plaintiffs offer any proof of --

7 MR. CIRESI: Excuse me, Mr. Corrigan. Your
8 Honor, those aren't the instructions of the court,
9 those are preliminary instructions. It's an
10 inappropriate comment.

11 THE COURT: Okay.

12 MR. CORRIGAN: Well Your Honor, it was
13 agreed upon by the parties as to what plaintiffs
14 characterized their case to be. If they've changed
15 it, they can say so in response.

16 MR. CIRESI: No, Your Honor, again that's
17 inappropriate.

18 THE COURT: Counsel, you'll have to
19 recharacterize it.

20 MR. CORRIGAN: All right. I'll be glad to
21 do that, Your Honor.

22 Did you hear a single witness come in here and
23 testify that B.A.T Industries made any promise, any
24 undertaking to anybody? No, you did not. That proof
25 never came. Did a single witness come in here and

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1 testify that B.A.T Industries concealed scientific
2 evidence about the hazards of smoking? Not one. The
3 proof never came. Did any witness come in here and
4 suggest to you that B.A.T Industries targeted
5 adolescents with advertising? Not one. That proof
6 never came. Did B -- did any witness take this

7 witness stand and offer an opinion that B.A.T
8 Industries manipulated nicotine in cigarettes? Not a
9 one. That proof never came. And it didn't come
10 because B.A.T Industries is a holding company, not a
11 tobacco manufacturer.

12 Now we have been through a very lengthy trial
13 about cigarette manufacturing, marketing, and
14 researching. Some 40 witnesses, I think, have come
15 before you to testify, either live or -- or by
16 deposition. Mr. Stirewalt's trial transcript is over
17 15,000 pages long. Over 2500 exhibits have been
18 received in evidence. But you have heard precious
19 little about B.A.T Industries. Other than the
20 videotape deposition of David Wilson, the company's
21 secretary from London, only two witnesses in this
22 entire trial even made any specific mention of B.A.T
23 Industries. And now that's not surprising because
24 B.A.T Industries is a company that is completely
25 different from every other one of the nine other

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1 defendants that are in this case, and the claims that
2 the plaintiffs have made against those defendants
3 simply do not fit B.A.T Industries. So today I'm
4 going to take just a little bit of your time before
5 Mr. Weber finishes for everyone else to let you have
6 my reasons why I believe plaintiffs have
7 unjustifiably sued my client.

8 My client is a company that did not even become
9 the parent owner of any tobacco corporation until
10 more than two decades after the meeting at the Plaza
11 Hotel in 1953. And in telling you a little bit about
12 B.A.T Industries, I hope I can eliminate any
13 confusion, and I think there has been some, some
14 confusion and uncertainty that come from both the
15 lawyers and the witnesses when they've talked and
16 used terms such as B.A.T, BAT Group, or BAT family of
17 companies, because confusion should play no role
18 here. Confusion and uncertainty should not be a
19 substitute for proof against my client.

20 But one piece of confusion should be clarified
21 right now. At times I think -- certainly it sounded
22 to me, and perhaps to you -- that there's only one
23 defendant in this case, a defendant named "the
24 tobacco industry." Plaintiffs and their witnesses
25 have frequently tried to lump all of the defendants

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1 together under a label such as that, "industry,"
2 "tobacco companies." But you're not being called
3 upon to render a verdict for or against the tobacco
4 industry, your job is going to be to make 10
5 decisions, because there are 10 defendants here.

6 As Judge Fitzpatrick described to you yesterday,
7 you are going to be given some questions to answer.
8 Not going to be just a "Yes" or "No" and we all go
9 home. You're going to get a piece of paper that will
10 have a series of questions. And he instructed you
11 yesterday that you are to answer the special

12 questions as to each defendant as though the lawsuits
13 are being tried separately. And that's what fairness
14 is all about, it means stripping away any confusing
15 labels and taking a good, hard look, hard objective
16 look at the evidence, the evidence concerning B.A.T
17 Industries, not the tobacco industry. And no matter
18 what conclusions you may reach as to each one of the
19 manufacturing defendants, your answers concerning
20 B.A.T Industries must stand alone, fairly and
21 objectively decided.

22 Let me quickly summarize the basic facts about
23 B.A.T Industries that we learned from Mr. Wilson in
24 his deposition and from the documents that he
25 discussed. We know that B.A.T Industries didn't even

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1 begin its life as a parent company in England until
2 1976. That's when it became the ultimate holder of
3 the stock in several hundred existing corporations
4 throughout the world. And this is 23 years after
5 1953, the year when the plaintiffs allege that the
6 U.S. defendants initiated the actions that are the
7 sources -- source of damages in this case. Because
8 B.A.T Industries did not come into being until 1976,
9 you have seen no documents, no evidence about my
10 client before that time. And you have heard a
11 tremendous amount about events that transpired during
12 the '50s, '60s, early '70s. You've heard about the
13 claim that the conspiracy was hatched at the Plaza
14 Hotel in 1953, and it was this conspiracy that caused
15 the state and Blue Cross to make increased medical
16 payments starting in the year 1978, just two years
17 after my client came on the scene. Before then B.A.T
18 Industries was not -- not on the scene, it wasn't
19 even formed at the time when the Frank Statement was
20 issued, when CTR and The Tobacco Institute were
21 created, when the Committee of Counsel was organized,
22 when special projects began, when this gentlemen's
23 agreement supposedly was made. During this -- during
24 this time no person smoked because of anything B.A.T
25 Industries did or did not do. There was no B.A.T

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1 Industries until shortly before the plaintiffs
2 started making Medicaid payments for those smokers.

3 What else have we learned about B.A.T
4 Industries? We know that from 1976 to the present it
5 has been a holding company, not a tobacco
6 manufacturer. As Mr. Wilson testified, the company
7 is in the business of owning or holding investments;
8 that is, the stock in other companies. At present
9 the corporations in which B.A.T Industries owns
10 shares carry on two types of businesses, insurance
11 and financial services, and the manufacture and
12 distribution of tobacco products.

13 We know that from 1976 to the present, unlike
14 all the other defendants here, B.A.T Industries is a
15 publicly held company, publicly held. From annual
16 reports we know that it has more than 140,000

17 shareholders that purchase shares in London. We know
18 that from 1976 to the present B.A.T's only office is
19 in London, England, and in that office there are
20 about a hundred employees. That's it. The job of
21 those hundred people is to be responsible to the
22 public stockholders for the performance of their
23 investment, but it is not their job and they cannot
24 run the day-to-day business of insurance companies
25 that it invests in or the tobacco companies that it

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1 owns.

2 So B.A.T Industries doesn't do what all the
3 other defendants in this case do. It does not make,
4 sell, advertise, or research any consumer product.
5 It doesn't produce tobacco -- cigarettes or grow
6 tobacco. It doesn't sell cigarettes, it doesn't
7 advertise cigarettes, it doesn't perform research on
8 cigarettes. None of its employees are cigarette
9 researchers, designers, testers or advertisers. It
10 has never been a member of the CTR, The Tobacco
11 Institute, or any other tobacco industry organization
12 or association. There is and could be no proof of
13 any of these things, and because that proof never
14 came, the claims don't fit.

15 Now as a holding company, does B.A.T Industries
16 completely isolate itself from the operations of its
17 subsidiaries, whether they be in insurance or
18 tobacco? Of course not. Mr. Wilson testified and
19 the exhibits that were -- have been introduced show
20 that the holding company does the kinds of things
21 that you would expect a holding company to do, it
22 means being involved in major decisions that have a
23 significant impact on the public stockholders, it
24 means coordinating business policy and ensuring
25 cooperation among and between subsidiaries in

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1 insurance and tobacco so they're not tripping over
2 each other. But the documentary evidence you may
3 have seen when you went through it on document day
4 shows quite clearly that the subsidiaries run their
5 own operations, and that the whole theme and history
6 of B.A.T Industries has been one of decentralized
7 management.

8 So you may have seen some of the exhibits that
9 were identified by Mr. Wilson in his deposition that
10 illustrate the kinds of things about smoking and
11 health and other matters B.A.T Industries does to
12 fulfill its function as a shareholder: issuing
13 public affairs guidelines, legal considerations,
14 guidance notes for business conduct, organizing
15 strategy review sessions. But there is no proof, nor
16 could there be, that B.A.T Industries makes decisions
17 that you would expect its subsidiaries to make. It's
18 not the function of a holding company to dictate to
19 subsidiaries like B&W or BATCo what marketing or
20 advertising they should do, what laboratory
21 experiments they should perform, or how they should

22 carry out the smoking-and-health research projects,
23 or what is the meaning of scientific findings made by
24 those scientists.

25 Now I hope these facts will help clarify some
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1 things that I believe have been a bit confusing in
2 this case. First, it's obviously incorrect to
3 confuse B.A.T Industries with BATCo. Yes, both
4 companies are part of what you have heard referred to
5 as the B-A-T Group, which is, by the way, the
6 correct -- the correct pronunciation, it's not BAT
7 Group, it's B-A-T Group. And so is B&W part of the
8 B-A-T Group. Mr. Wilson described for you what that
9 means. That's the collection of all of the
10 companies, including B.A.T Industries, and it's a
11 shorthand way of referring to them all. Very common.
12 You may have heard of the Kemper Group of insurance
13 companies. Use of that phrase doesn't mean that the
14 holding company of Kemper Group actually sells
15 insurance any more than B.A.T Industries actually
16 manufactures and sells cigarettes. But the point is,
17 there is no single company, no defendant here by the
18 name of B-A-T Group.

19 Secondly, it should be clear, I think, by now
20 that plaintiffs' tendency to lump all the defendants
21 together under labels such as "tobacco industry,"
22 "tobacco companies," is inaccurate and misleading, at
23 least as to my client, and so has in the past been
24 the use of the term "defendants." Remember that a
25 number of plaintiffs' witnesses used the device of

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1 showing you some documents from one tobacco company's
2 files and then saying that there were similar
3 documents from the files of the defendants? Well it
4 was really wrong and unfair for them to do that if by
5 that they were implying that that included B.A.T
6 Industries, whether before or after 1976. Witnesses
7 such as Mr. Hurt and Dr. Robertson, Professor Perry,
8 did do this, but in fact not one of them rely upon a
9 single document from the files of B.A.T Industries to
10 support their opinion.

11 Now knowing what B.A.T Industries really is and
12 how it is really quite a different kind of company
13 than all the others that are before you, I think you
14 can see that you just can't make plaintiffs' claims
15 fit. Let -- let's talk about some of these claims
16 specifically.

17 The first claim is what has been referred to as
18 the special duty claim. The judge gave you
19 instructions about it yesterday. This is a claim
20 made by the state, not by Blue Cross, and it really
21 centers on the 1950s and the Frank Statement. The
22 judge instructed you yesterday that some of the
23 defendants voluntarily assumed a special duty to
24 perform certain undertakings, and those undertakings,
25 those promises can be found in the Frank Statement.

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1 The question for you is, as to those defendants who
2 did sign the Frank Statement, is whether they
3 breached those promises. But Judge Fitzpatrick also
4 told you yesterday that B.A.T is not one of those
5 defendants. B.A.T Industries never signed the Frank
6 Statement. It couldn't have, it wasn't even born
7 yet. And no witness who came into this courtroom
8 even suggested that, any time after the Frank
9 Statement was issued, that B.A.T Industries
10 voluntarily undertook to perform any special duty
11 ever. So as to B.A.T Industries, you don't even get
12 to the question of a breach of a special duty. You
13 can't break a promise that you did not and could not
14 make.

15 So then let's turn -- turn to the next set of
16 claims, what have been referred to as the consumer
17 protection claims. Plaintiffs claim that each one of
18 the defendants violated the Minnesota consumer
19 protection statutes, and Judge Fitzpatrick yesterday
20 read those three statutes to you, and you may recall
21 that they really all had some elements in common. In
22 essence it's against the law in this state to lie to
23 consumers in connection with the sale of a product.
24 Now those claims just don't fit B.A.T Industries.
25 The company doesn't market or advertise or sell

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1 cigarettes in Minnesota or anywhere else.
2 And that leaves us with the plaintiffs'
3 catch-all conspiracy claim, whether it's couched in
4 terms of antitrust law or some other generalized
5 conspiracy. This is the device that plaintiffs seek
6 to use to loop B.A.T Industries into this case. And
7 I submit to you that this claim must fail for the
8 very same reasons as the others, failure of proof.
9 The proof never came.

10 Now the judge gave you instructions yesterday
11 about the law of conspiracy, and one of those
12 included his instructions that it is -- I'm quoting
13 now -- an agreement to act together that constitutes
14 the offense. There's absolutely no proof in this
15 case that B.A.T Industries entered into any sort of
16 unlawful agreement relating to Minnesota consumers,
17 the U.S. cigarette market, or anything else. B.A.T
18 Industries had nothing to do with the facts that
19 plaintiffs rely on to support this claim, nothing to
20 do with Hill & Knowlton, Plaza Hotel, CTR, special
21 projects, Tobacco Institute, gentlemen's agreement,
22 Committee of Counsel, none of that.

23 Now as Judge Fitzpatrick instructed you
24 yesterday, B.A.T Industries cannot be liable on
25 plaintiffs' conspiracy claim simply because it owns

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1 the stock of B&W. The case against B.A.T Industries
2 has got to stand or fall on the specific proof, or, I

3 suggest to you, lack of specific proof, about its own
4 actions. No witness offered any testimony that B.A.T
5 Industries itself performed any conspiratorial act
6 and no witness offered any testimony that B.A.T
7 Industries intentionally participated, through any of
8 its subsidiaries, in any kind of conspiracy to
9 suppress competition in the U.S. cigarette market or
10 any other market.

11 Now liability certainly can't be premised on
12 speculation, surmise, uncertainty, confusion. And I
13 think that's what we have here. I submit to you
14 that's what we do have here. And I think that's a
15 pretty good indication to you that plaintiffs have
16 failed to prove their conspiracy claims and all their
17 other claims against B.A.T Industries.

18 What is it that they try to do to fill this
19 gaping hole in their case? Well you know it was
20 impossible for B.A.T Industries to conspire with
21 anybody before 1976, so their antitrust expert,
22 Professor Jaffe, needed to come up with some proof
23 that sometime after 1976 B.A.T Industries made an
24 agreement with Philip Morris or RJR or Lorillard or
25 one of the U.S. companies, other than its own

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1 subsidiaries, to become a new member of a conspiracy
2 to compress competition -- suppress competition in
3 the U.S. cigarette market, join in a conspiracy that,
4 according to plaintiffs, had been launched 23 years
5 earlier. Now plaintiffs poured through thousands of
6 documents, thousands of them, and they couldn't come
7 up with a single communication between B.A.T
8 Industries and any of these American companies that
9 reflected or even suggested that B.A.T Industries was
10 making any agreement to join any conspiracy. So what
11 are we left with? Well Professor Jaffe decided that
12 what he would do is he would step out of the very
13 U.S. market that he defined as being relevant in this
14 case, and he took one document about an incident in
15 Holland and he misinterpreted it. You may recall the
16 1983 letter in which B.A.T Industries informed Philip
17 Morris that it was suing Philip Morris because Philip
18 Morris's Dutch subsidiary published an advertisement
19 in Holland that slandered Barclay cigarettes, and if
20 you take a look at the letter and not just the parts
21 of it that Dr. Jaffe showed you, it becomes
22 abundantly clear that these three companies were not
23 conspiring, they were at each other's throats over
24 the whole Barclay matter. And that's it. That is
25 the entirety of plaintiffs' conspiracy case against

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1 B.A.T Industries. It's no case at all.

2 Now I would like to talk to you a little bit
3 about causation, which Judge Fitzpatrick mentioned to
4 you during his instructions yesterday. He informed
5 you that the defendant bears no responsibility in
6 this case unless plaintiffs prove that the conduct of
7 that defendant was a substantial factor in bringing

8 about the injury for which damages are sought. Now
9 in this case there is no proof of any connection,
10 much less a substantial one, between B.A.T Industries
11 and the state of Minnesota, Minnesota citizens or
12 Minnesota consumers. There's no proof that B.A.T
13 Industries directed any wrongful conduct towards this
14 state or its smokers or its Medicaid recipients.
15 Plaintiffs are trying to stretch their case to
16 include a company that doesn't even do business in
17 Minnesota, a company that makes no shipments or sales
18 in Minnesota, and this failure of proof, I submit to
19 you, can't be covered up by talking about BAT Group
20 or pretending there's no difference between B.A.T
21 Industries and B&W. B&W obviously does business in
22 Minnesota, as do all the other U.S. companies. They
23 sell cigarettes here, they advertise here. But the
24 question before you is not whether B&W or the other
25 U.S. manufacturers have acted to harm Minnesota, the

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1 question is whether B.A.T Industries has, and I
2 submit to you the answer to that question is no, and
3 the proof should lead you there.

4 Plaintiffs have failed to prove that B.A.T
5 Industries did any of the specific things that are
6 basic to this lawsuit. There is and could be no
7 proof that anyone in Minnesota has ever smoked a
8 cigarette made by B.A.T Industries, or ever read a
9 cigarette advertisement published by B.A.T
10 Industries, or received any sort of promise from
11 B.A.T Industries. No one in Minnesota, including the
12 state itself and including Blue Cross, has ever been
13 deceived by anything that B.A.T Industries did or did
14 not do. And since there is no proof of a
15 cause-and-effect relationship between B.A.T
16 Industries' conduct as a holding company, any, and
17 the plaintiffs' payment of Medicaid expenses here in
18 Minnesota, there's no basis for any damages,
19 compensatory or punitive, against my client. There
20 is no conduct to compensate for, there's no conduct
21 to punish.

22 Now Mr. Monica took you quickly through the
23 special verdict form that you will be receiving at a
24 later point. I will not do that again because it's
25 too cumbersome for you, not having it in front of

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1 you. You will be getting a document that has a
2 number of questions on it. As I mentioned before,
3 many of the questions will have -- or require you to
4 answer "Yes" or "No" for the list of the defendants,
5 for each defendant. I just want to draw your
6 attention to a few things that I hope will be of some
7 use to you when you do retire to deliberate.

8 The very first question that you're going to get
9 has to do with the special duty claim, and it's got
10 the defendants listed here, and you're asked to
11 decide whether each one of those defendants
12 voluntarily undertook this special duty. Now the

13 judge has already filled in the answers for certain
14 of the defendants, as I mentioned earlier, because
15 he's already made a determination that they did
16 assume that duty, and for them you will be going on
17 to the next question. But as to B.A.T Industries,
18 the line is blank, and I submit that, because of
19 failure of proof, your answer to that question should
20 be no. And if it is no, then that is the end of your
21 inquiry on the special duty claim.

22 You then will go to questions about the consumer
23 protection statutes, and I respectfully submit to you
24 that because plaintiffs have failed to carry their
25 burden of proof, when you see B.A.T Industries on

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1 this list, your answer should be no, and it will be
2 unnecessary for you to go to the further questions
3 regarding those statutes.

4 Likewise the antitrust claim. The answer, I
5 respectfully submit -- submit to you as to B.A.T
6 Industries, should be no. And to simplify things, to
7 the extent that the answers don't call for a "yes" or
8 "no," I submit that your answer, when it calls for
9 percentages of dollars, should be zero.

10 The broom of the plaintiffs' case sweeps just
11 too much, it stirs up some confusion and uncertainty,
12 but it doesn't bring up evidence with respect to
13 B.A.T Industries. I respectfully submit that you
14 should take this uncertainty and confusion as a
15 signal, a signal that the plaintiffs just haven't
16 come up to the plate as to my client. And the burden
17 of proof is 100 percent, 100 percent on the
18 plaintiffs. There is no burden, no obligation on
19 B.A.T Industries to come in here and say -- and show
20 and try to prove it didn't do things. It's up to the
21 plaintiffs to show that we did, and that proof never
22 came.

23 Now all of the parties are getting close to
24 putting this case in your lap. It's a pretty awesome
25 responsibility, I'm sure you are aware of that, and I

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1 know you're taking it seriously. Each one of you,
2 each one of the lawyers here is asking you, after you
3 deliberate, to render a fair and an impartial
4 verdict. So I merely say to you that regardless of
5 your decisions concerning any of the other parties to
6 this case, that in all fairness and in all
7 objectivity, there is one client, one defendant at
8 least that is entitled to be exonerated by your
9 verdict, and that is my client, B.A.T Industries of
10 London, England.

11 And I thank you for your time and attention.

12 THE COURT: We will take a 10-minute
13 recess. By 10 minutes, I mean 10 minutes.

14 THE CLERK: Court stands in recess.
15 (Recess taken.)

16 THE CLERK: All rise. Court is again in
17 session.

18 (Jury enters the courtroom.)
19 THE CLERK: Please be seated.
20 THE COURT: Counsel.
21 MR. WEBER: Thank you, Your Honor.
22 Good afternoon, ladies and gentlemen.
23 (Collective "Good afternoon").
24 MR. WEBER: Mr. Bleakley earlier today
25 referred to me as the cleanup hitter, and I suppose
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1 in one way that's true. The cleanup hitters do tend
2 to be a little -- if I must say -- heftier than the
3 rest of the lineup, and certainly in my time in
4 Minnesota, I think I've picked up a few pounds. But
5 it's true in another sense as well. I am the last of
6 the defense lawyers that will be speaking with you,
7 and because I'm going last, there's a couple
8 preliminary points I just wanted to touch on with
9 you.

10 One of them is: On behalf of my client, R. J.
11 Reynolds, and all the rest of these lawyers here and
12 their clients, and quite frankly I'm sure the state,
13 Blue Cross, their lawyers, thank each of you
14 individually and as a group for the extraordinary
15 attention, patience, and commitment you've shown to
16 all of us throughout this long journey we've traveled
17 together. You know, I don't think in our society
18 that there's -- other than military service, there's
19 probably nothing our civic duty demands of citizens
20 that is harder to do than sit as jurors in a long,
21 complex trial. We all appreciate that. We
22 appreciate your demeanor, your patience. And again,
23 on behalf of my client and I'm certain all the other
24 defendants and lawyers, thank you for that.

25 And as long as I'm talking about that issue of
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1 civic duty, I just wanted to think with you for a
2 minute about what it is will happen and what it is
3 you're about when you go into that room to
4 deliberate. You know, philosophers have spent
5 centuries working and trying to define this concept
6 of justice, and while I don't mean to criticize the
7 philosophers -- I'm certainly not able to -- I'm not
8 sure that in the end justice remains something that
9 ought to be left to the philosophers. Indeed, I
10 think in our society, the beauty of our society, the
11 beauty of our system, is we -- we place justice in
12 the hands of friends, residents, neighbors in the
13 community. We call them together in a random
14 selection, we put them in a jury box, we tell them to
15 listen to the evidence, follow the instructions from
16 the court, and then reach a decision that among
17 themselves represents fairness and justice to the
18 community. Here in America only you, only you people
19 in this box have the authority to determine in
20 fairness and justice how this dispute should be
21 decided. Only you. That decision can't be made by
22 the media outside that we have to fight through every

23 day, it can't be made by politicians, can't be made
24 by lawyers. It's only you. Society entrusts you
25 with that decision. And to make that decision and
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1 exercise that unique responsibility, I think you're
2 going to have to, as individuals and as a group, draw
3 on the commitments you made when you were first
4 selected, commitments to evaluate all of the evidence
5 in its context, to put aside any preconceived
6 judgments, any pre-judgments, commitments to be fair,
7 bring your God-given common sense, your sense of fair
8 play to this verdict, wholly apart from any appeals
9 to emotion or passion or prejudice, but base it on
10 the facts, the common sense, your sense of fair play
11 and the law that the court has given you. And you
12 have to do that wholly without regard to what other
13 people who aren't in this jury box with you may think
14 the verdict should be, because it's only your
15 judgment that matters.

16 And in that sense I think the deliberations
17 you're about to undertake will require all of the
18 common sense, fairness, and indeed courage you can
19 muster, common sense to separate what really matters
20 from appeals to emotion or passion, fairness to be
21 applied to everyone, including these companies before
22 you, who are engaged in a business that isn't popular
23 and isn't politically correct, and finally courage to
24 stand by your individual convictions, to think about
25 the evidence and what it means and whether the

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1 plaintiffs are entitled to receive the sums of money
2 they're seeking. In the final analysis, then, it's
3 your own good-faith judgment on these facts that will
4 provide the definition of justice in this case for
5 all of us.

6 It's fallen to me, as it did in the opening
7 statement, to speak last, and I'm going to be
8 addressing three key points in my time with you.
9 First I'm going to talk about the evidence in this
10 case regarding marketing and advertising of
11 cigarettes and some of the claims about youth, why
12 they smoke. Second I'm going to talk about money,
13 the money the plaintiffs' lawyers will ask you for in
14 their argument. And they're seeking two kinds of
15 damages, they're seeking damages based on their
16 statistical model, compensatory damages, and they're
17 seeking a separate kind of damages above and beyond
18 that called punitive damages. And I'll talk to you
19 about that as well.

20 But before I discuss those issues and get into
21 them in some detail with you, I hope you'll allow me
22 a few minutes just to talk about my client. As I
23 mentioned to you some many months ago back in January
24 when I last had the opportunity to speak directly to
25 you, my client's the R. J. Reynolds Tobacco Company

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1 in Winston-Salem, North Carolina, and I'm proud to be
2 here in front of you on behalf of that company and
3 the nine thousand hard-working men and women who are
4 the R. J. Reynolds Company. You've heard in this
5 courtroom a good deal about Reynolds and its historic
6 accomplishments and its traditions; a company with a
7 long list of achievements about which it justifiably
8 has pride. It introduced the first commercially
9 successful filter cigarette, it was the first to make
10 cigarettes with reconstituted tobacco sheet, it was
11 the first to use expanded tobacco, it's been a leader
12 in air-dilution technology. Its labs -- and we
13 showed you one of these documents -- have been
14 acknowledged publicly by Drs. Wynder and Hoffmann for
15 the many contributions to the published literature on
16 what is known about smoke and the constituents of
17 smoke. And of course you've heard that Reynolds is
18 the company whose research department, through
19 investment, ingenuity, and finally old-fashioned hard
20 work and some good luck developed products such as
21 Premier and Eclipse, true technological
22 breakthroughs.

23 Now these are indeed significant accomplishments
24 and they came about only through these kind of
25 commitments I've spoken to you about, but to be sure,

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1 Reynolds made some mistakes over the years, over this
2 45-year period that's been discussed in this case,
3 all the way back, if you think about it, to 1953, the
4 first year of the Eisenhower administration -- a
5 whole different world it seems -- and it's no
6 surprise that over that period of time Reynolds would
7 have made some mistakes. Forty-five years, tens of
8 thousands of employees working day-in, day-out, it
9 would be a miracle if some things hadn't happened
10 wrong, if there hadn't been some misjudgments.
11 They've made mistakes in the marketplace, they've
12 lost market share for years. As you've heard, they
13 used to be one of the leaders or the leader, now
14 they're not. They made mistakes like, in -- in one
15 sense, betting hundreds of millions of dollars on the
16 Premier cigarette and losing every nickel of it in
17 the marketplace. And mistakes in judgments such as
18 when, as you heard, for a period of years up to about
19 1982 Reynolds used to collect, among its
20 share-tracking data, data that gave them information
21 on share of market of people under 18. But here
22 again is where I want to talk to you and emphasize
23 throughout this that notion of fairness, because it's
24 no more fair in the basic sense of the word to demand
25 perfection absolutely from Reynolds or any other

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1 institution or any person or any family over 45
2 years. I hope you understand me here. Mistakes are
3 mistakes. They did happen. All I'm asking is that

4 as we look at the evidence, we place it in a broader
5 context of Reynolds' overall conduct over these 45
6 years. No one wants to be judged only on a few
7 mistakes; people don't, families don't, companies
8 don't. We're not looking for excuses, just asking
9 for fair judgment in the context of our times.

10 And if you'd allow me just one little brief
11 sports analogy here to make the point, I know for
12 years everybody in the American League admired the
13 Twins because it had Kirby Puckett, such a great
14 ballplayer, great professional. Worked hard, put out
15 every day. But if someone were to take the films of
16 all the Twins games that Kirby Puckett played in and
17 only brought out the video clips of every error he
18 made, every time he struck out, every time he hit --
19 missed the cutoff man, every time he didn't deliver
20 for the team, you could put together a pretty long
21 set of tapes, and you could look at that tape and
22 show it to somebody who didn't really know and they'd
23 end up thinking Kirby Puckett was a pretty bad
24 ballplayer. And in one sense the film would be true,
25 it's actually what happened, but I think of course we

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1 all know there's something wrong with that film: it
2 wouldn't be fair. It doesn't look at the whole
3 context. And that's the issue I want us to keep in
4 mind as we go through this and for you to think about
5 in the course of your deliberations; that is, a
6 willingness to consider the whole history, to look at
7 documents that surround documents that are in
8 evidence, look at some others, get the context, read
9 the whole document, don't just look at a few
10 distorted video clips.

11 That's why it was important for R. J. Reynolds,
12 for me as their lawyer, to have here three of their
13 top executives, Andy Schindler, president and CEO, 24
14 years at the company, Dave Townsend, the
15 vice-president of product development, 20 years at
16 the company, Lynn Beasley, the vice-president of
17 marketing, 16 years at the company, highly
18 professional, competent, decent people, typical of
19 those at RJR. Andy Schindler and Lynn Beasley, you
20 know, each went through college in a pretty unusual
21 way any more, Andy on the GI Bill after Viet Nam,
22 Lynn after working in the post office and a factory
23 down at Richland Center in Wisconsin, then going on,
24 both of them getting their graduate degrees and going
25 straight to R. J. Reynolds. Dave Townsend, dedicated

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1 worker in that research lab for 20 years, working on
2 cigarette technology, changing, trying to make it
3 better. They came here to explain to you their
4 life's work, what it is they do for R. J. Reynolds,
5 how they go about it, what Reynolds does and why, how
6 their work at Reynolds fits in the broader social
7 conduct -- context of our society's relationship with
8 cigarettes.

9 Now in evaluating R. J. Reynolds -- and I'm
10 using my client now as an example -- I think we have
11 to keep in mind and focus on what R. J. Reynolds did
12 that dramatically lowered tar and nicotine in its
13 cigarettes. It was commended for its publications,
14 it responded in a clear and responsible way to the
15 challenges of the public health community, and even
16 after the government shut down the Tobacco Working
17 Group in 1978 for political reasons -- and you heard
18 that testimony -- even after that happened and the
19 less-hazardous cigarette was no longer an acceptable
20 goal, Reynolds continued to invest hundreds of
21 millions of dollars in that technology, technology
22 that resulted in Premier and Eclipse. That
23 dedication to providing its customers with the best
24 cigarettes that are possible has been the hallmark of
25 this company for years, and I think that's a fact

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1 that is undisputed on this record.

2 There are some few Reynolds-specific issues I
3 want to talk with you about and I want to touch on at
4 this time, even though it may not make the most
5 perfect sense to you as you sit there, and I want to
6 explain why. The reason is I don't get another
7 chance to speak with you after the plaintiffs' lawyer
8 does. He'll talk with you tomorrow. I'm not sure
9 what they're going to raise. But I won't have the
10 chance when they're done to get up and say hey, look
11 at this issue, look at this document, let's make sure
12 we put this in this context. So I want to address a
13 few issues that I anticipate they'll discuss but
14 about R. J. Reynolds tomorrow, I want to speak with
15 you about it, and then I want to move on to those
16 other issues that I identified I'll be discussing.

17 First of all, I want to touch on what the record
18 shows about R. J. Reynolds' biological research
19 activities. I want to begin with the allegations of
20 the closing of the R. J. Reynolds biological research
21 division in 1970. You heard about that a number of
22 times. Now let's start with what's undisputed on
23 this record regarding that. And what's undisputed on
24 this record is the testimony from someone who was
25 there at the time, the only testimony from that type

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1 of person, that's testimony from Dr. Murray Senkus.
2 You remember Dr. Senkus testified by deposition here
3 on March 12. He's a distinguished gentleman, very
4 elderly now. He was formerly the head of research at
5 R. J. Reynolds years ago. Dr. Senkus testified, and
6 this is undisputed, that that biological division was
7 doing work other than smoking-and-health work. Did
8 some smoking-and-health work, also did pharmaceutical
9 work at that time because Reynolds was thinking of
10 merging with a pharmaceutical company, it did
11 chemical work because Reynolds was thinking about
12 getting into the chemical business, and it was
13 building a smoking machine for CTR to give to its

14 grantees to do inhalation work. It's also undisputed
15 from what Dr. Senkus said on this record there was a
16 change in management at RJR following the death of
17 Bowman Gray, who had been a long-time president at
18 Reynolds, and he died while the biological division
19 was still operating. Thereafter, Dr. Senkus told
20 you, the company decided not to acquire a
21 pharmaceutical company, no need for the
22 pharmaceutical work, it finished the smoking machine,
23 delivered it to CTR. It's also undisputed from what
24 Dr. Senkus said that the type of work on smoking and
25 health that was being done at the biological division

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1 continued to be funded through industry sources,
2 through CTR, and through grants to the AMA. So new
3 management was in place after Mr. Gray passed away,
4 so there was no pharmaceutical merger on the horizon,
5 the smoking machine had been finished, and the BRD
6 was cut back.

7 Now why, then, is there an issue about whether
8 or not this was proper or not. The logic seems
9 clear. The work reduced, they cut it back. It's
10 because of two documents that were put in evidence by
11 the plaintiffs, and neither one is an R. J. Reynolds
12 document, neither one comes from Reynolds' files, and
13 neither one was prepared by Reynolds' employees, they
14 weren't addressed to Reynolds, they both state
15 information that neither author of either document
16 had any first-hand knowledge about, they're riddled
17 with rumor and second-hand hearsay, but the general
18 story in them is so and so told so and so told so and
19 so that somebody at Reynolds said that they closed
20 the biological division because of a gentlemen's
21 agreement. One of the authors writes that Mr.
22 Galloway, what was the president of RJR at the time,
23 was surprised when he found out this was going on.
24 That's in one of these articles. But one of -- or
25 one of these documents by one of these authors who

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1 isn't from R. J. Reynolds. But Dr. Senkus told you
2 that Galloway knew about the biological division, and
3 Dr. Senkus was there. That same document says that
4 Dr. Nielsen of Reynolds resigned when the BRD was
5 closed, but Dr. Senkus testified -- who was there --
6 testified Dr. Nielsen didn't resign. The other
7 author recounts a conversation with a Dr. Price about
8 what was going on at R. J. Reynolds, but Dr. Senkus,
9 who was there, doesn't recall any Dr. Price having
10 been there.

11 So let's return to what Dr. Senkus testified to.
12 And what he told you, he was never told he couldn't
13 do in-house biological research or outside biological
14 research, he didn't know of any such agreement, and
15 that RJR continued to do work and fund it outside.
16 Now this touches on a point Mr. Bernick made. I'm
17 not going to repeat what he said, but I just wanted
18 to refer you to a few exhibits that you'll have the

19 opportunity to look at if you'd like that do deal
20 with the fact that RJR did biological research and it
21 did it in-house. In Exhibit 26256, which is an
22 exhibit the plaintiffs may talk about tomorrow, the
23 new head of research and development at Reynolds said
24 he recognized no agreement to limit the type of
25 research he wanted to do, and it was under him that

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1 the research for Premier got underway.

2 On document day earlier this week you saw
3 Exhibit 12543, which is a Reynolds fundamental R&D
4 report outlining the results of Ames research
5 in-house on smoke, smoke condensates from the period
6 1978 up through '83, and it refers to the fact they
7 were also doing work on tobacco flavors during this
8 same period. So that work was being done. And this
9 direct -- this document I just referenced directly
10 references as an allegation of plaintiffs that RJR's
11 in-house lawyers told them they couldn't do work --
12 Ames testing in-house on these types of programs.

13 And of course, what more can be said about RJR's
14 biological research than this, which is AZ1568? I've
15 shown you this a couple times. I showed you on
16 opening, used it with Dr. Townsend. This is the RJR
17 monograph on Premier. It talks about all the
18 research funded -- that RJR funded outside and all
19 the research it did inside, including inside -- or
20 in-house animal experiments.

21 I want you to recollect for just a moment that
22 Dr. Jaffe sat on that stand and said he didn't think
23 R. J. Reynolds did animal experiments in-house in
24 connection with this. That was part of the
25 conspiracy. I don't blame Dr. Jaffe for being

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1 mistaken on that because the plaintiffs' lawyers
2 probably hadn't given him this book to read. But if
3 you do read this book, there's no way you can make a
4 statement that R. J. Reynolds wasn't doing in-house
5 research with animals and that -- and that it
6 published it in connection with this monograph.

7 Now you'll also hear a claim from the
8 plaintiffs' lawyer, I imagine, that R. J. Reynolds at
9 one time destroyed documents other than in the
10 ordinary course of business. And this is a powerful,
11 emotional issue. That's why it's been raised. I
12 think you may remember that there was a document put
13 in evidence shown to Dr. Appleton when he was
14 testifying that talked about an R. J. Reynolds
15 evaluation of whether certain research reports should
16 be, quote, unquote, invalidated and collected from
17 the research files, and Mr. Ciresi asked Dr. Appleton
18 whether Reynolds had a policy about that. And that
19 document didn't say documents were being destroyed,
20 it said they were being collected and invalidated.
21 And whatever that meant, what's important to focus on
22 is on your recent document day you saw evidence that
23 whatever that document meant, any attempt to have

24 collected hard copies and taken them out of the
25 research department files was futile, and people knew
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1 it, because Reynolds was microfilming those materials
2 and had copies.

3 I refer you to ASP34, a monthly research report
4 two years before the document that the plaintiffs
5 showed Dr. Appleton, and it talks about how they're
6 microfilming notebooks, reports, pamphlets,
7 everything, to make sure they've got a separate copy
8 apart from the hard copy. I also refer you to ASP35,
9 which I'm going to put a piece of up there. This is
10 October 1967, again two years before the document
11 they referenced. All notebooks and reports are being
12 microfilmed for safe storage. Years later there's
13 another document that the plaintiffs have put in
14 evidence, 26341, which Dr. Colby, who was the
15 librarian -- you've heard about him, he was in charge
16 of scientific information, he ran the R&D library --
17 Dr. Colby was interviewed by Reynolds' lawyers years
18 later, and in 26341 he said the formal reports were
19 all microfilmed.

20 Now you've heard how plaintiffs have conducted
21 all sorts of discovery in this case. If there had
22 been a whole series of research documents that had
23 been collected and destroyed, you would have seen
24 some evidence, you would have seen the fact that
25 footnotes in reports referred to reports that didn't

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1 exist, or you would have found references, citations
2 to missing reports. But there isn't any of that.
3 And ASP34 and ASP35 tell us why. For whatever reason
4 hard copies may or may not have been collected, all
5 of it, all of those formal reports and lab notebooks
6 were kept on the microfilm. And Dr. Appleton, who
7 was the only witness who was asked about this by Mr.
8 Ciresi, said that during his time at R. J. Reynolds
9 he never saw any policy where documents of this type
10 were collected and put away. So here, too, I urge
11 you to put aside whatever emotionalism there may be
12 and look at the facts, look at the documents, reach
13 your fair and just conclusion. And remember that the
14 R&D library had a process in place to microfilm and
15 retain.

16 One last issue I want to touch on for Reynolds
17 before I move on is -- deals with some documents put
18 in evidence on the most recent document day prepared
19 by some of my law partners. Now as is evident from
20 looking at them, what they were was some documents
21 put together early in our representation where we
22 were asked to get a handle on things and understand,
23 go through mountains of data, try to figure out what
24 the arguments are pro/con. I want you to know that
25 any lawyer doing his duty must undertake an analysis

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1 like that, particularly where there's hundreds of
2 thousands of documents, and the analysis needs to be
3 a critical one, where part of your time has to be
4 spent looking for holes and not just doughnuts. You
5 got to think of how the other side might use things
6 in evidence, how they might argue, what issues you
7 need to prioritize, which ones are likely to come up,
8 which ones aren't. You know, part of what we have to
9 do is almost reverse-engineer your case, think about
10 what the plaintiffs are going to say. And indeed
11 it's very clear on one of the documents they put in
12 evidence that that's precisely what happened. If I
13 can get it up for you.

14 MR. BLEAKLEY: It's up.

15 MR. WEBER: Oh, it is. I didn't hear.

16 This is the first page of it. And you see what
17 my partners wrote? They say, "Our discussion of the,
18 quote, unquote, misconduct contentions is not
19 objective; rather, it is intended to present a worst
20 case analysis colored with the adverse conclusions."
21 That's part of what lawyers do in analyzing their
22 case. I'm sure it's part of what the plaintiffs'
23 lawyers have done in their case, analyzing the fact
24 that the state gave cigarettes away in juvenile
25 homes, the fact that Mr. Humphrey said that the best

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1 way to stop youth access is for the state to enforce
2 its laws. Everybody has to go through critical
3 analysis in defending cases. The bottom line is what
4 lawyers write about facts or how they characterize
5 facts doesn't change facts. So I urge you, don't
6 bite onto the plaintiffs' offer to think that when
7 lawyers start analyzing issues to understand complex
8 matters, that there's something wrong with that.
9 Lawyers have a duty to look at historical events and
10 think about them, to critically review them and move
11 on.

12 So with that in mind, let me ask -- you know,
13 leave you with a few questions to make sure you keep
14 in mind as you think about R. J. Reynolds as you move
15 along. Did anything alleged here prevent Reynolds
16 from being a recognized leader in identifying smoke
17 constituents or from bringing -- being a leader and
18 bringing about the lowering of tar and nicotine or
19 from the development of Premier and Eclipse? Of
20 course not. Now are you going to judge Reynolds on
21 some few distorted clips pulled out, or are you going
22 to look at the whole picture to get the fair context?
23 The answer will be in that evidence, and I urge you
24 to look at it fairly and to look at it in the
25 entirety of its times.

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1 My last point here: As I said, I won't have an
2 opportunity to speak after the plaintiffs' lawyer, so
3 I ask you in fairness to the process, when you go in
4 there and deliberate, think about the questions that

5 I might ask if I had a chance to rebut, if I had a
6 chance to ask follow-up questions, if I had a chance
7 to refer to other evidence, to make sure that as you
8 go through your own critical thinking process you
9 test contentions against fact.

10 What I'd like to do now is move to that issue,
11 first of the major substantive issues I wanted to
12 touch on with you, and that's the evidence about
13 advertising, how cigarettes are and have been
14 marketed, evidence regarding why these companies
15 advertise, evidence regarding why people choose to
16 smoke, including some people who are under the legal
17 age to smoke. What does the evidence in this case
18 tell you about that?

19 Well first I want to tell you what the issues in
20 this case are not. The issue before you is not
21 whether some underage people experiment with
22 cigarettes or whether some underage people start
23 smoking cigarettes regularly or whether that's too
24 many people who do that, because we know all of those
25 are true and it's been true since Mark Twain wrote

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1 Tom Sawyer and Huck Finn where the boys went out and
2 experimented with tobacco. Those things happen. The
3 question before you is not whether underage youth
4 smoke or whether that's a good thing,, we know it's
5 not,, the question before you is whether plaintiffs
6 have met their burden of proof that these companies
7 deliberately and with intent took action to cause
8 underage people to smoke, and whether that action
9 damaged the state of Minnesota and Blue Cross.

10 Now in summary, I think the evidence answers
11 those questions pretty directly, tells us that these
12 companies have advertised and marketed and marketed
13 against each other in a competitive environment to
14 defend and increase their share of adult smokers.
15 The evidence shows they did not do marketing research
16 on the underage. And the evidence, and I'm -- I'll
17 get into this a little bit later in some more detail,
18 Ms. Beasley told you the way you go about doing this
19 kind of work is you do research and then you develop
20 a marketing plan based on the research. That's
21 what's happened since she's been at Reynolds. That
22 was the practice before she was at Reynolds, she
23 said. They haven't done that kind of research on the
24 underage and they haven't developed marketing
25 programs for the underage.

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1 Second, and much of this came out of the
2 cross-examination of Professor Perry who -- who I
3 hope -- whose testimony I very much hope you
4 remember, because the other question is: The
5 evidence shows that the decision on whether or not
6 somebody becomes a smoker is far too complex to blame
7 on any one factor or to ascribe to any one factor.
8 It's a complex social issue. And the data, if you
9 separate them from emotion, the data show that

10 advertising and marketing play no significant role in
11 that decision and have not been advertised or -- and
12 have not been demonstrated to be connected.

13 And let's focus on a few things that are really
14 undisputed in this area of advertising and marketing.
15 It's undisputed that advertising and marketing in
16 this business is highly competitive. It's also
17 undisputed that this market has been declining for
18 years. It's not a market that's growing, it's a
19 market that's decreasing. And these companies are
20 realistic, they know it's decreasing so they know
21 that their chance to keep their business successful
22 depends on either maintaining their market share in a
23 declining market or increasing their market share in
24 a declining market. That's it. And the marketplace
25 shows us the proof of this. It shows us that a

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1 former leader like American Tobacco got so small it
2 got bought by Brown & Williamson. It shows us that
3 Liggett, a former leader, is barely in the business.
4 That's why it is so logical and makes business sense,
5 when you think about it, that these companies do work
6 hard to try to get the competitive smokers. And the
7 best example of that -- I don't want to make this too
8 complicated, but the best example on that in this
9 whole trial was this chart I drew with Mrs. Beasley,
10 if you remember.

11 Mrs. Beasley told us that R. J. Reynolds has 25
12 percent of the adult smokers and that her competitors
13 have 75 percent, and she said even in a declining
14 market -- and we all know it's that -- this is my
15 opportunity as -- as a marketing person for R. J.
16 Reynolds. Sure, I've got to defend my customers, but
17 my opportunity is this 75 percent. This is millions
18 of adults in America who are choosing to smoke but
19 saying I don't want to use a Reynolds brand, I want
20 to use something else. That's where Mrs. Beasley's
21 job is, and it makes economic sense.

22 Now it's true that most smokers don't switch
23 that often. That's true. There is brand loyalty.
24 But the evidence also shows that a substantial number
25 of people do switch, and these are the key groups in

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1 the whole marketing effort.

2 I want to refer you here, and -- and I hope you
3 remember this, Exhibit 12579. This is a document the
4 plaintiffs' lawyer made a number of dramatic readings
5 from in this case, a number of them, but he never
6 read you this part. This is a document by Diane
7 Burrows of Reynolds, a research document, and what
8 Diane Burrows said in this memo, she said Marlboro
9 loses about 28 percent of its 18-year-old smokers by
10 age 20 and another 14 percent by age 24, a total loss
11 of 42 percent in that six-year period. That's young
12 adult, that's a legal market, and that's 42 percent
13 are switching. And if you remember, Mrs. Beasley
14 testified to the precise same thing. Her numbers may

15 have been slightly different. She talked about 18-
16 to 29-year-old smokers being a key switching
17 opportunity. So sure, there's some brand loyalty,
18 but that's where the action is in marketing of
19 cigarettes. People are going to be switching in
20 those age groups, and you want to try to give them a
21 reason to choose your product.

22 This memo, by the way, by Diane Burrows, 12579,
23 is another example of the distorted video-clip
24 approach that plaintiffs have used. There are over
25 500 references in this document to adult smokers and

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1 groups -- different groups over the age of 18 -- 18
2 and over. It's a long document, over 500 references.
3 This document was put in front of you a number of
4 times, but none of that was referenced. There's one
5 reference in here to underage that was shown time and
6 again, and what that was was an appendix in the back
7 where Ms. Burrows collected some public data from the
8 government about the ages at which people start
9 smoking. Now it's also no secret that cigarette
10 advertising addressed to adults will in some places
11 and occasions be seen by people underage. It's not
12 unique for cigarettes, it's true for any adult
13 product. As a matter of fact it's true for any
14 product that has a target audience. You're going to
15 advertise it, but it's not only seen by the people
16 you're trying to market to. The controversy over
17 whether underage see cigarette ads has been with the
18 society for generations. You've heard a lot of that
19 history. And through some voluntary action and some
20 regulation much has been done to limit underage
21 exposure to ads consistent with the right of these
22 companies to market to adults and the right of adults
23 to receive marketing messages. So what has been
24 done? TV and radio bans since 1971. Even before
25 this, an ad and marketing restriction code agreed to

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1 by these companies with the knowledge and blessing of
2 the Federal Trade Commission. Mr. Monica touched on
3 some of those issues with you when he spoke.

4 Mrs. Beasley came here, took that stand and
5 explained those advertising restrictions to you. She
6 told you how they only advertise in newspapers and
7 magazines that are not primarily directed to people
8 under 21, about the billboard-location restrictions,
9 about the model age restrictions, about, how to
10 participate in a promotion, someone has to sign a
11 sworn certification saying they're 21 and that they
12 want to receive the offer. She has told you some of
13 the things Reynolds does to check up on this, that
14 when they mail these, they make sure it's labeled
15 clearly "Cigarette Promotion" so if it's going into a
16 house where somebody signed a false certification,
17 other people will get a chance to see.

18 You also saw on document day other evidence
19 about steps Reynolds has taken and other companies

20 have taken to make sure they're not directing their
21 marketing efforts to youth. On document day, and I
22 think April 22nd, you saw numerous examples of
23 Reynolds declining requests to support events at
24 schools or to put its name in a school program, et
25 cetera, et cetera. Just can't do it. You saw with

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1 Mrs. Beasley the action Reynolds takes to gets its
2 logos off toy cars when it finds somebody else is
3 messing with its trademark, and particularly with
4 respect to things that could be sold to children.
5 And it's also interesting, again, to see an example
6 like this where the producers of the film American
7 Graffiti, if you remember that -- it's kind of a
8 retrospective, lot of old music, et cetera -- asked
9 for permission to play Reynolds' radio commercials in
10 the movie, and the answer was no, we've looked at the
11 script, and the young ages of the central characters
12 preclude our client's association. The answer was
13 no.

14 It's also clear on this same issue, and
15 undisputed -- if I can get that off -- that
16 defendants brought in for you and subjected them to
17 cross-examine two highly successful, experienced
18 business professionals in marketing, and it was
19 particularly -- particularly interesting to me
20 because they came from two different generations
21 really, people who actually did this marketing, who
22 marketed major successful brands like Marlboro,
23 Virginia Slims, Now, Camel, Winston. One of them was
24 Jim Morgan, whose involvement with Marlboro, his
25 insistence on the single-minded focus of that ad

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1 campaign is legendary, and it's legendary not because
2 the Marlboro advertising campaign caused underage
3 people to smoke, it's legendary because Marlboro did
4 well in a declining market. Marlboro not only held
5 its own, it grew in a declining market. And keep in
6 mind on the Marlboro issue, a vital fact that Cheryl
7 Perry told us on cross-examination, she talked, if
8 you'll remember, how powerful that Marlboro campaign
9 was and how appealing to males, the masculinity -- I
10 hope you remember that -- and then on
11 cross-examination I showed her how her own chart,
12 which was 30243, showed that for the first eight, 10
13 years of the Marlboro campaign, when she said it was
14 so powerful, how the male initiation smoking rates;
15 that is, for underage, that is under 18 male,
16 starting smoking rates went down. Again, further
17 evidence about the total lack of any connection
18 between advertising messages and this complex issue
19 about the ups and downs of why kids smoke.

20 In addition to Mr. Morgan you heard Mrs.
21 Beasley, marketing professional from a newer
22 generation, and she came to marketing as -- into that
23 early through a little bit of untraditional route,
24 starting in a dairy farm in Richland Center,

25 Wisconsin and moving on to executive vice-president
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15881

1 and a member of the Executive Committee at Reynolds
2 after only 16 years with the company. What Mr.
3 Morgan and Mrs. Beasley told you from their
4 perspective, their over 50 years' combined
5 experience, is that they have only researched adult
6 smokers and only marketed to adult smokers. They
7 made this point to you time and again. In a
8 declining market they need to hold market share and
9 gain market share.

10 Now from the Reynolds' perspective, that's the
11 way the chart looks. Philip Morris's perspective,
12 I'm sure you know now, the chart looks a lot
13 different. Philip Morris has a lot bigger share.
14 But they explained to you the importance of that,
15 defending smokers and seeking new smokers from other
16 competitive companies. That's where the game is in a
17 declining market.

18 I also urge you to use your common sense when
19 you think about some of the allegations that are
20 made. Mrs. Beasley made it clear that government
21 data shows that only two percent of cigarette sales
22 are made to underage. Two percent. And as she
23 explained, it's the controversy over that two percent
24 that puts at risk the right to market to the 98
25 percent which represents the real business of

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15882

1 Reynolds. Would smart businessmen and smart business
2 women put at risk their right to market for that two
3 percent when the -- when the 98 percent of that
4 business that's out there that their company doesn't
5 have is important to them to advertise to?

6 Mrs. Beasley also explained to you in some
7 detail how major consumer goods companies, including
8 cigarette companies, research and develop marketing
9 plans. She went through that in some detail, how
10 they begin by picking out a brand, they talk to adult
11 smokers of that brand, then they talk to adult
12 smokers of the competitive brand that they want to
13 try to get smokers from, then they analyze the data,
14 then they go back and do more focus groups, talking
15 to smokers of their brand, talking to adult smokers
16 of the other brand, then they do more analysis, then
17 they think some more, they go back and talk, maybe
18 they show these adult smokers different ideas at that
19 point, talk to them about what they're looking for in
20 a brand. This activity generates lots of documents,
21 and it goes on, as Mrs. Beasley said, sometimes for
22 well over a year. And if RJR were researching people
23 underage, you would have seen those documents here.
24 And you didn't.

25 There's no evidence that any defendant company
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1 in this case did any of this type of marketing
2 research on the underage, and that in itself should
3 end the debate on that question. They didn't do the
4 research they needed to market and they didn't do the
5 marketing.

6 So then what really is the source of this
7 controversy that brings us here on advertising?
8 And -- and I think there's two separate pieces. One
9 is the experts. Plaintiffs brought in two experts on
10 that topic. And then the other piece are some of the
11 documents that have been picked out, some of these
12 little video clips that I think give an unfair
13 perspective of what these companies have been about.

14 The two experts were Professor Perry and
15 Professor Dolan, neither one of them a marketing
16 practitioner. They came in here and gave you their
17 opinions. Professor Perry said minors were uniquely
18 vulnerable to cigarette advertising. She's an expert
19 in adolescent behavior, although she did think the
20 age to vote here in Minnesota was 21, if you'll
21 remember. She said advertising for cigarettes is
22 everywhere, and that, therefore, influences and
23 causes underage people to smoke. But again, after a
24 long series of questions she did acknowledge that the
25 1994 Surgeon General's report on youth smoking, which

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1 she edited, never reached any such conclusion on
2 cause.

3 The other expert was Professor Dolan, and he
4 came in here and looked at some documents that had
5 been selected for him, then he speculated about what
6 these companies intended. He said, well, they
7 intended to get new people in the market and they
8 intended to get quitters to come back and they
9 intended to stop people from quitting. And together,
10 from out of hundreds and hundreds of thousands of
11 marketing documents, these two put together a theory
12 based on a very small handful of pieces of paper, and
13 Mrs. Beasley and Mr. Morgan refuted their charges
14 directly and subjected themselves to
15 cross-examination in front of you so they could deal
16 with those issues directly.

17 So what does the totality of the evidence say,
18 then, about why underage people smoke? What's --
19 what's affecting that? What are the issues? There
20 have been many different investigations of that.
21 You've heard a lot about them here. I'll just
22 mention a few. One of the widest ranging is the 1994
23 Surgeon General's report itself. That did not
24 conclude that advertising caused underage to smoke.
25 It explicitly didn't. You remember the introduction

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1 by the Surgeon General said that was even the wrong
2 question to ask. The evidence shows that, and it
3 also shows that adolescents have a very low regard
4 for smoking. We went through that data with
5 Professor Perry.

6 So how has this issue been looked at? I want to
7 touch on a few pieces of evidence with you. One way
8 to do this is you can go talk to smokers, and if
9 you're the government you can go talk to underage
10 smokers. The FDA did just that. This is AT507 where
11 the FDA went out and talked to teens. What were the
12 reasons teens have for smoking? Sure wasn't
13 advertising. Indeed, they -- even after being told
14 to focus on advertising, the answer -- the teens made
15 it clear that advertising wasn't a factor. This is
16 from the FDA's own report.

17 Second, you could look at who smokes, look at
18 the background, look at the characteristics and try
19 to study them and see what you come up with. One of
20 those we put in evidence was an AM2026, a 1972 report
21 from the federal government, HEW, the one -- it talks
22 about the importance of influence of others around
23 you. And it went on to say, if I can get the next
24 page up there, "If parents and older brothers and
25 sisters are avid readers, the child grows up in an

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1 atmosphere where reading is the thing to do, where
2 books are readily available, and we can expect him,
3 at least, to try reading. The same phenomenon is
4 operating in the area of smoking behavior." Federal
5 government, '72.

6 There's also AM2033, a '79 report that put out
7 the statistics showing if your best friends smoked,
8 you were very likely to smoke, and if your best
9 friends didn't smoke, you were very unlikely to smoke
10 as an adolescent. '79, U.S. government.

11 How about the 1987 Economic Report of the
12 President? That was put in evidence as well. The
13 Economic Report of the President in 1987 looked at
14 this issue. What did they say? "The effects of
15 tobacco advertising are complex. There is little
16 evidence that advertising results in additional
17 smoking." That means little evidence that
18 advertising causes anyone to smoke. "Advertising
19 mainly shifts consumers among brands," and here
20 again, this is very important, "Evidence from other
21 countries suggests that banning tobacco advertising
22 has not discouraged smoking." And it goes on to cite
23 the data: four industrialized countries had banned
24 advertising, yet experienced a rise in per capita
25 consumption. That's data, that's not expectation.

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1 I'm sure you'll also remember that list I went
2 through with Professor Perry on cross-examination
3 straight out of the Surgeon General's report. That
4 was a list of factors associated with why underage
5 kids smoke. I won't go through all, I just want to
6 reference a few, and I hope you remember this part of
7 the testimony. Socioeconomic status, level of
8 education, level of parent's education, number of
9 parents in the home, availability of cigarettes,
10 parental reactions, whether the parents are concerned

11 or supportive.

12 One point I'd like to show you just on its own
13 here, again from the '94 Surgeon General's report,
14 peer influence, "The influence of peers has been
15 posited as the single most important factor." Other
16 factors Professor Perry admitted: academic
17 achievement, desire to take risks. And she said that
18 adolescents' attitudes as to whether smoking is
19 acceptable or not come from a wide variety of
20 sources, from -- and -- and it's common sense,
21 sources like what their parents say and do, what
22 their siblings say and do, what their friends say and
23 do, their school, their community, their church.
24 That's what forms adolescents' attitudes on smoking.
25 And Professor Perry admitted that she didn't know of

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1 one adolescent whose only information about smoking
2 came from the tobacco industry. The whole formation
3 of attitudes toward this, the whole social phenomenon
4 about why these decisions get made can't be laid on
5 the shoulders of the industry that's marketing to
6 adults.

7 You can also look at some other reasons as to
8 what is known about why people smoke. This is
9 another document I went through with Professor Perry,
10 and it's from the 1979 Surgeon General's report.
11 This was the last series of questions I asked her on
12 cross. This covers, I think, 1976 to 1992, a period
13 during which advertising and promotional expenditures
14 increased, increased pretty consistently. And these
15 lines show that the rates of smoking, one to five
16 cigarettes a day, less than one a day, half pack,
17 smoked in last 30 days, however you measure it, the
18 rates of adolescent smoking among high school seniors
19 went down except for one real faint line you can
20 barely see there, it kind of stayed the same. In
21 this period when advertising and promotion
22 expenditures increased consistently, the only line
23 that went up consistently is the dark one, never
24 smokers.

25 I also asked Professor Perry about the fact that

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1 from '92 to '96 adolescent smoking rates did increase
2 a little, and we looked at Exhibit AM596 from the
3 University of Michigan study, and adolescent rates
4 among high school seniors who smoked at all over the
5 last 30 days went up 22 percent. But again, through
6 the questioning it was apparent that there was more
7 going on because illicit drug use among the same
8 group had increased 70 percent, three times more,
9 over a hundred percent for 10th graders, over a
10 hundred percent for eighth graders. I also asked
11 Professor Perry on cross, if you'll remember, about
12 the Youth Risk Behavior Survey of the federal
13 government, that survey that showed a whole bunch of
14 unfortunate behaviors by adolescents: binge
15 drinking, drinking and driving, using marijuana on

16 school grounds, carrying weapons to school. And I
17 wrote all those percentages down, if you'll remember,
18 and one of those is having a cigarette in the last 30
19 days. And it was amazing to see the way those
20 numbers compared.

21 And I'm sure you were surprised, as I was, when
22 Dr. Perry tried to explain away the high rate of some
23 of these behaviors by testifying that it was possible
24 that cigarette advertising might be causing some of
25 these behaviors, like carrying guns to school.

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1 Or, if you're interested in why kids smoke, you
2 can look at other evidence. You can look at other
3 countries who never had advertising or had very
4 little. Remember the quote from the president's
5 economic report I showed you a few minutes ago that
6 referenced how ad bans had been put in in
7 industrialized countries? No advertising and
8 consumption rose.

9 This is from the Surgeon General's report 1979,
10 "In Communist countries, smoking is prevalent without
11 any advertising of any sort to support it." And this
12 is directly relevant because in every society we know
13 there's a certain segment of the population that
14 smokes whether or not there's advertising, whether or
15 not the government likes it, whether or not the
16 public health community likes it, there is some
17 percentage of people who smoke. That's the reason
18 there are tobacco companies.

19 And this is stark refutation. I think this is
20 in direct contrast to the theory that you've heard
21 about here that these companies, because it's a
22 declining market, the allegation that these companies
23 have to go out and try to get, quote, unquote,
24 replacement smokers. The fact of the matter is, the
25 market is declining, but it's still a pretty big

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1 market, and at -- and there's always going to be some
2 percentage of people who choose to smoke. It's true
3 everywhere around the globe, Communist countries,
4 countries that ban advertising. And those adults, at
5 least up to this point in our history, have a right
6 to buy cigarettes and companies have a right to
7 market to them.

8 There is no evidence in this case from these
9 companies or anyone else that says that these
10 companies can turn non-smokers into smokers. It's
11 not in the files because the companies certainly
12 don't think that. And there's no research out there
13 that says companies can turn non-smokers into
14 smokers. '94 Surgeon General report didn't say that.

15 Professor Perry said, oh, there's some new
16 research. I've changed my mind. But four of those
17 explicitly said they weren't looking at that issue,
18 and the one that did had all sorts of missing data
19 and it was a mess and they didn't use a statistical
20 confidence level. Whatever that market of adult

21 smokers is, that's the market where the competition
22 is.
23 Now what about Professor Perry's claim that
24 cigarette advertising is ubiquitous, it's everywhere?
25 Well it's not. Hasn't been on TV or radio since
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1 1971. That's the media to which adolescents are most
2 exposed. Plus you also saw evidence that puts
3 cigarette advertising in perspective. Remember Mr.
4 Much talked about the FTC numbers, how much was
5 reported to the FTC as having been spent on
6 advertising and promotion? And remember we made it
7 clear that those numbers really weren't limited to
8 either spending or advertising, those numbers are
9 inflated under the governmental reporting system
10 because they include discounts, they include payments
11 to retailers to put the product on the shelf, they
12 include coupons, on and on. But in there there are
13 some advertising numbers. They're much, much smaller
14 than what Professor Much led you to believe. But let
15 me just deal with that issue for a moment now.

16 Mrs. Beasley testified -- tried to bring some
17 context to what is spent on advertising, and what she
18 referred you to was what is known in the advertising
19 business as an advertising-to-sales ratio. Now I
20 know this is almost impossible to see, but if you
21 look at these videos, I just put them up not so you
22 can see the details, because I know you'll remember
23 the chart, the ones in pink are the industries that
24 have higher advertising-costs-to-sales ratios than
25 the cigarette industry; that is, they spend more -- a

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1 higher percentage of their total sales on advertising
2 than the cigarette industry. What this shows you is
3 the spending on advertising in the cigarette industry
4 is kind of middle of the pack. Mrs. Beasley stood
5 right here and explained that to you. This is data
6 from Advertising Age. She also went on, if you
7 remember, and showed you that Megabrand Survey from
8 Advertising Age that listed the top 200 advertised
9 brands. Only one was a cigarette, Marlboro, and it
10 wasn't top -- number one or top 20, it was number 67.
11 So that's context in understanding the way business
12 works, and context on this claim of ubiquity.

13 But putting aside that claim, which is
14 unsupported by the facts, the evidence is also clear
15 that adolescents don't think highly of smoking or
16 smokers. Remember, I went through a chart, and it's
17 on page 82 of the 1994 Surgeon General's report, I
18 went through it with Professor Perry where they
19 surveyed attitudes of seniors -- high school seniors
20 over time, over a time period when advertising and
21 promotion increased, and attitudes to smoking got
22 worse, it wasn't cool, it didn't make you look
23 sophisticated, it didn't this, it didn't that. The
24 attitudes weren't changing. They weren't getting
25 more positive, they were getting worse.

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1 So so much for Professor Perry, Professor Dolan.
2 What about these documents that were pulled out of
3 the hundreds of thousands that were produced? There
4 are, for example, several Reynolds documents written
5 by Diane Burrows, who I referenced before, that
6 suggest that only a few smokers start after 18, and
7 we've heard that a lot in this case. Overwhelming
8 majority start before 18, almost everybody before 18.
9 Well, when you go through the documents, keep in mind
10 one issue for almost anything you do. This is a
11 perfect example. That's definitions. When you talk
12 about youth smoking -- and I had a chart up there a
13 moment ago, they have rates for one cigarette in 30
14 days, rates for who smokes five or more, five or
15 less, rates for within a week, rates for within a
16 year, rates for pack or more. You got to understand
17 what they're talking about. When they talk about the
18 data on the overwhelming majority start before 18,
19 you know what's included in that, in the government
20 data? You know, it's Tom Sawyer: anybody who's ever
21 experimented is included. If you've experimented,
22 you're in the data. And who at one time or another
23 doesn't experiment with a cigarette? If you don't,
24 it's probably because you grew up with friends who
25 didn't smoke.

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1 So when they say that the number of regular
2 smokers who start before 18, overwhelming majority of
3 them did, what they're really saying is that they
4 experimented when they were kids and eventually
5 became smokers. And again, definitions are
6 important.
7 I want to show you from the Surgeon General's
8 report itself, Surgeon General's report, you say well
9 wait a sec, how can that be true if the overwhelming
10 majority start before 18? This is a consistent
11 number that shows up in Surgeon General report after
12 Surgeon General report. Here they're talking about
13 what people are normally talking about, regular
14 smokers. And that average is 18 and that's the legal
15 age. Surgeon General's report 1979 -- or excuse me,
16 1981.
17 You also heard about a 1974 presentation at
18 Hilton Head that included in one reference, I
19 think -- two references, maybe, to 14- to
20 24-year-olds, and then there was the strategy section
21 of the memo that we've talked about with various
22 witnesses and from there on all the age groups
23 referenced were over the adult age, but there were
24 those references up front, and there was a 1980
25 document at Reynolds from Mr. Long to Mr. Horrigan

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1 that mentioned 14 to 24 as well. And we addressed

2 those documents. Mrs. Beasley came here to talk
3 about that and what she knew, and she was questioned
4 about it. And it wasn't an issue of just -- well
5 strike that. The issue here is just taking a
6 document out and not following it up. Both those
7 documents talked about the plans, planned campaigns,
8 and the question is what were they referring to? Did
9 they really mean to include underage in that, or were
10 they referring to share data? Was it -- whatever it
11 was, were they really planning to do that? If you
12 were interested, would you stop at that document or
13 would you look to see what they did? Plaintiffs
14 stopped at the document. They didn't put those ad
15 campaigns in front of you. The ad campaigns were
16 referenced in those documents. They didn't show them
17 to you. We did.

18 And you'll remember this, you know, document
19 about Meet the Turk that was referenced in Hilton
20 Head. Meet the Turk, that's a -- those are all the
21 ads from that. That's a youth campaign? Even
22 Professor Perry had a hard time claiming that.

23 How about the Winston "Candid" campaign that was
24 referred there as well? Youth campaign? This was
25 another one referred to. Is this causing kids who

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1 aren't smoking, who are out there playing gall, to
2 say, boy, I'm going to have a smoke. Not even
3 Professor Perry could claim that.

4 Or how about the campaigns in the fall of 1980
5 that were referenced in the memorandum from Mr. Long
6 and Mr. Horrigan? Mrs. Beasley put those in front of
7 you. She showed them to you. Those youth ads?
8 These ads say more about what was really going on in
9 terms of marketing than any endless lecture from
10 Professor Perry ever could. All you got to do is
11 look at those Meet the Turk ads, look at those other
12 ads, and you see those are ads designed for adult
13 smokers.

14 You know, another telling part of the story from
15 plaintiffs' strategy about trying to appeal to your
16 emotion and take things out of context, doing so with
17 less than the story, it appears in their presentation
18 of an RJR Project LF document. I hope you remember.
19 Plaintiffs put that into evidence. It was 24145.
20 And I talked to Mrs. Beasley about that document. I
21 think it was very telling what they did. This was a
22 document on Project LF when Mrs. Beasley was in
23 charge of Camel, and it referred to the age group for
24 Project LF as 13 to 24. Plaintiffs put that in
25 evidence. But they had lots of documents. Did they

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1 show you all the documents in front of this that said
2 18 to 24 or all the documents that post-date this
3 that said 18 to 24? No. And I hope you remember, we
4 brought in a document right before and a document
5 right after, and it showed this was a typo. And we
6 brought in Mrs. Beasley, who was in charge of Camel

7 at that time, and she said it was 18 to 24. But they
8 just put that in, and it's one of the best examples
9 you could have about this distorted video-clip
10 technique that's been going on here for all these
11 many weeks. The references I'd like to give you are
12 AZ8920 and AZ8921. Those are the documents right
13 around that. The documents plaintiffs didn't show
14 you.

15 You also heard about Reynolds tracking the
16 market share it had over the years, and it does track
17 its market share. And for a period of time in the
18 past it got information in that tracking about people
19 under 18. You also heard from Mr. Schindler that
20 practice ended around 1982, and he said it was stupid
21 to have done that.

22 Mrs. Beasley talked about this too. She told
23 you why from a marketing perspective -- this is
24 vital -- that data was unusable to develop marketing
25 campaigns. It was share of market, it was age, it

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1 was where people lived. It was none of the type of
2 stuff that would be used and developed through
3 research for a marketing campaign. Remember how she
4 explained what you had to do to develop a marketing
5 campaign? She testified and was subject to
6 cross-examination on this and wasn't asked any
7 questions about it, that data that was on underage
8 share was totally insufficient to develop a marketing
9 campaign. She also testified she never used underage
10 tracking data in connection with a marketing campaign
11 or saw anybody else who did.

12 There's another document that came in recently,
13 it's 13458, it's a document from the Brown &
14 Williamson production about a project called Plus
15 Minus. This is a 1982 report prepared by an outside
16 vendor for a company called Imperial Tobacco.
17 Imperial Tobacco isn't in this case. Canada isn't in
18 this case. Simply not a defendant.

19 Now finally let me turn to my last general issue
20 in this area and ask a question. What about Joe
21 Camel? What about a cigarette company that used an
22 illustration -- or call it a cartoon. What about
23 that? Wasn't that done to get kids? Well we could
24 just as easily ask, I suppose, what about Bullwinkle?
25 State of Minnesota chose to use an illustration for

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1 its -- for an adult product it had, lottery tickets,
2 and they even chose to use one who was a star of
3 children's cartoons. We showed you how a cartoons
4 and illustrated figures are used lots of time for
5 adult products. Minnesota isn't wrong to use
6 Bullwinkle. Adults like Bullwinkle. We showed you a
7 number of other products advertised for adults with
8 illustrated characters, all the way back to my
9 favorite that I remember well, Speedy Alka Seltzer
10 used to do the Friday Night -- one of the co-sponsors
11 of the Friday Night Fights when I was a little kid.

12 Now you heard from Joe -- the Joe Camel
13 campaign's creator when Mrs. Beasley walked in here
14 and sat on that stand. She told you how that program
15 was run, how she thought about it, what the
16 demographic age group she was interested in and the
17 precautions that Reynolds took to avoid any
18 particular appeal to youth in that campaign. Again,
19 another memorandum that we put in evidence, AM1453,
20 when they launched the Joe Camel 75th birthday
21 campaign, remember that? It specifically said avoid
22 any youthful look, don't use party hats for the
23 birthday. Remember, it said no punk look, no punk
24 hairdos? Don't do it. And that's because the focus
25 group showed that those had appeal to younger.

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1 And remember how she said in the focus groups
2 they asked people do these ads appeal to your age,
3 older or younger? If they said younger, the ads
4 weren't used. They had some roller-blading
5 executions and other things. Didn't use them if they
6 didn't pass the focus group test.

7 From January 20th to today plaintiffs haven't
8 shown you one Joe Camel document that says anything
9 except the target was adult smokers. They haven't
10 shown you anything to contradict that. Those
11 documents aren't there. The target was adult smokers
12 18 to 24, and that's what Mrs. Beasley told you as
13 well.

14 So how did they address Mrs. Beasley when she
15 was here? Well the plaintiffs' counsel implied she
16 wasn't being truthful, that somehow she really hadn't
17 been responsible for developing the Joe Camel
18 campaign. Do you remember those questions about,
19 like, you know, your name isn't on these documents.
20 And I hope you remember as well as I do the surprise
21 on plaintiffs' counsel when he found that the
22 document he was talking about had Mrs. Beasley's name
23 on it, only was her maiden name, Breninger.

24 They tried to suggest there was something wrong
25 with Mrs. Beasley's testimony because she didn't come

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1 in here and read a bunch of documents. But as she
2 said, she was here to answer questions. She was
3 subjected to cross-examination, and they couldn't
4 attack the substance of what she said because the
5 facts are undeniable: the campaign was a success, it
6 was a success with its target market 18 to 24 and 18
7 to 34. Camel held its share in that period in a
8 declining market. You know, in a declining market,
9 even to hold share is better than what might happen
10 otherwise.

11 Mr. Morgan also came here. He talked to you
12 about Philip Morris's advertising. He put brand plan
13 after brand plan in front of you, all of them 18 and
14 over. He said that in his years here he'd never seen
15 a marketing strategy or brand or media plan that had
16 anything other than lawful smokers in it.

17 You also heard testimony about things these
18 companies have done on the subject of youth. Mr.
19 Schindler told you about the R. J. Reynolds Right
20 Decisions Right Now program. I'm going to touch on
21 that a little bit later, program prepared by child
22 psychologists with public service announcements by
23 Dan Glover and Will Smith, posters that have been on
24 TV shows like ER, Fresh Prince, et cetera, a program
25 that's in a number of middle schools. And I'll

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1 address that later. PM's program Action Against
2 Access. Remember, the companies don't sell at
3 retail. The PM program goes directly to retail. The
4 TI program We Card, training program for retailers.
5 And remember the We Card, remember when Professor
6 Perry brought in all those pictures of those stores
7 and all the advertisements, and we asked her why on a
8 couple of them they'd taken the picture so that you
9 couldn't see the We Card sign on the cash register?
10 No response.

11 Now Mr. Much prepared some charts, if you'll
12 remember, intended to belittle the amount of money
13 these companies spent on youth prevention issues.
14 I'll just do it right here. Remember, he's got this
15 big circle and he's got the little sliver. You'll
16 remember those. We must have seen them 10 times in
17 this case. And what that chart is is the entire FTC
18 expenditure, payments to retailers in Minnesota,
19 retailers in every other state, discounts, coupons
20 and advertising. It's all there. But again, if you
21 remember, would there have been a fairer way if you
22 wanted to present this? If you wanted to present
23 that fairly, it wouldn't have taken very long to
24 think how. First of all you'd say, well, I guess
25 I'll do it with advertising. Maybe I'll include

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1 promotions, but I certainly won't include coupons and
2 discounts and payments to retailers. So I'd have
3 changed the size of the circle to make it smaller.
4 And then if you want to really be fair you say, well,
5 what's the size of the youth market according to the
6 government? Well it's two percent of the total
7 market. So wouldn't you compare the expenditures on
8 youth that these companies have made, the efforts
9 they've made to that two percent instead of a hundred
10 percent that includes all the adults they're
11 perfectly legally entitled to advertise to? Don't
12 you think that would have been fairer instead of
13 comparing that number to advertising and expenses for
14 adults?

15 We all care about children, it's an emotional
16 issue, and I expect you'll hear a lot about
17 protecting children. I want to touch on that later.
18 But when you do hear about that, I ask you to take a
19 deep breath and don't give into emotionalism, but
20 look at facts. And the facts, not lawyers'
21 speculation, not professorial opinion, not distorted

22 video clips, the facts are that these companies
23 didn't research the underage and they didn't
24 implement plans to market to the underage. The facts
25 are that the decisions of the underage people to

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1 smoke have been going on in this country for
2 generations. Rates go up, rates go down. They're
3 not related to advertising and promotion expense,
4 they're not related to ad bans in other countries,
5 they're not related to advertising. It is a complex
6 question that everyone wishes they had the answer to,
7 but they don't.

8 People smoke in all societies to some degree.
9 Millions of Americans still do despite all the
10 controversy, even though it's going down. It's
11 simply wrong and not supported by the evidence to
12 blame the fact that some people choose to smoke on
13 these companies, and it's also wrong to criticize
14 these companies for their efforts to engage in their
15 legal marketing to adults to defend their market
16 share and increase it.

17 Your Honor, I know you'd said you wanted to take
18 a short break about now, I think.

19 THE COURT: All right. We'll take a short
20 break, 10 minutes maximum.

21 THE CLERK: Court stands in recess.
22 (Recess taken.)

23 THE CLERK: All rise. Court is again in
24 session.

25 (Jury enters the courtroom.)

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1 THE CLERK: Please be seated.

2 THE COURT: Counsel.

3 MR. WEBER: Thank you, Your Honor.

4 Ladies and gentlemen, I'm going to move to the
5 second of my three topics now, and these last two, if
6 you'll remember, deal with money, the money that the
7 plaintiffs are asking you to award them. And I may
8 be a little more disjointed than I'd like to be
9 because I know we'd like to get done at least by
10 5:30, and I'll try to get done a little bit ahead of
11 that and hope I don't have to beg indulgence for more
12 than a minute or two after.

13 In opening statements -- I want to start with
14 these compensatory damages. In opening statements I
15 stood in this very place and represented to you that
16 this trial would expose plaintiffs' statistical model
17 to be a sham, to be unreliable and unacceptable as a
18 matter of statistical science, and we delivered on
19 that in spades. You heard from Dr. William Wecker,
20 formerly of the University of Chicago, University of
21 California, now a consultant at Stanford, former Air
22 Force pilot, winner of the DFC. You heard from
23 Professor Donald Rubin, former editor of the Journal
24 of the American Statistical Association, recipient of
25 international prizes, professor at Harvard and former

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1 chair of the department of statistics at Harvard, and
2 you heard from Professor Brian McCall, the highly-
3 respected econometrician and statistician right here
4 at the U of M, they all told you the same thing, the
5 model was biased, the model was unreliable, and the
6 model is no basis to force my client or to force
7 anybody else's client to take out a checkbook and
8 write a check. And quite frankly, plaintiffs know
9 it. They have run from that statistical model from
10 the beginning of this case.

11 You remember in opening statement what the
12 plaintiffs' lawyer said about the model? I'll bet
13 you don't because he only said two sentences. And
14 the way he described it, he said it was a
15 sophisticated model. His words, not mine. And I
16 agree with him, those are well-chosen -- that is a
17 well-chosen word. And I've written the dictionary
18 definition of "sophisticated" there: not simple, not
19 natural. And the model isn't simple and it's very
20 unnatural.

21 They ran away from the model at trial. Remember
22 Dr. Samet? He was hands off on the model. He said
23 he claimed no expertise in health-care modeling, that
24 was for Zeger, Wyant and Miller. Dr. Miller didn't
25 even come to trial. He worked on the model, but he

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1 wasn't going to get on the stand. What about Dr.
2 Zeger? Dr. Zeger testified about the model, but only
3 about the core model, what they call the core model.
4 What model formed the basis for the 1.7 billion
5 dollars they want from my client? Wasn't the core
6 model, it was the refined model. And Zeger washed
7 his hands of it, he didn't testify to that, that was
8 someone else.

9 The only testimony they offered on their final
10 damage estimates came from Dr. Wyant, and it's no
11 surprise they picked on Dr. Wyant to defend this
12 model. He'd never been a professor at any
13 university, he'd never served on the editorial board
14 of any journal, never served on any national
15 committees, two publications his entire career. I'm
16 sure he's very good at what he does, but he is
17 unquestionably the least-credentialed of any
18 scientist who testified in this case. I'm sure you
19 remember him. He was, I think, the only witness in
20 this case that took the stand and never really looked
21 the jury in the eye. He also testified that for the
22 damage claim he was presenting it didn't matter how
23 big the statistical error in his estimate -- estimate
24 was. Rather extraordinary testimony. Didn't matter
25 how big. That's with respect to statistical

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1 significance, plus or minus 80 percent, doesn't
2 matter how big to him.

3 You may also remember, because he has
4 acknowledged that he prefaced his Ph.D. dissertation
5 with a quotation that, as Dr. McCall told you,
6 references the misuse of statistics. This is a
7 question of Dr. Wyant, how we started off his Ph.D.
8 dissertation: "And isn't the quote, the one that you
9 started off with, 'There are three kinds of lies:
10 lies, damned lies and statistics by Disraeli?"

11 "Answer, that's correct."

12 That's how Dr. Wyant started his Ph.D.
13 dissertation.

14 They want you to forget that this is Dr. Wyant's
15 testimony that it depends on. They even pulled a
16 bait-and-switch. Do you remember just recently
17 plaintiffs' lawyers stood here and said, well
18 let's -- I want to use the word Zeger model, we'll
19 just keep referring to the Zeger model. Do you
20 remember that? That was only last week.

21 It wasn't a Zeger model. Zeger didn't testify
22 about the final damage estimates. The testimony
23 about the refined model and the damage estimates
24 isn't Samet, it isn't Zeger, it isn't Miller, it's
25 Wyant, and it's wrong. It's wrong because of bias,

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1 unreliability, bloated estimates, ignoring
2 information, failing to compare like to like, based
3 on general population extrapolations instead of
4 public aid comparison, because it makes up data like
5 Dr. Rubin told you it did, and even with all of that,
6 if you go into that model and look at it and you
7 compare public aid to public aid, smokers to
8 non-smokers, even with all the problems it shows the
9 state didn't pay more for the smokers. No
10 smoking-attributable expenditures.

11 But they didn't do like to like, public aid to
12 public aid, non-smoker to smoker. They based it on
13 general population. They got exaggerated estimates.
14 720 million dollars for the youngest group, 19 to 34
15 males, based on underlying data that they didn't look
16 at for kidney donations, hemorrhoids, mental illness,
17 stuff even they admit isn't caused by smoking in any
18 way, shape or form. 87 million of a projection based
19 on the two 94-year-old women we've heard a lot about,
20 women who hardly smoked at all and had no diseases
21 that related to smoking. But that's the way this
22 sophistication works. 352 million for coronary heart
23 disease/stroke in that model, a number that drops by
24 46 percent if you simply add the additional factors
25 of exercise and depression, 46 percent. But they

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1 want that check for 352 million based on this
2 sophisticated model.

3 Plus, it's filled with errors. The pluses or
4 minuses on statistical significance, as Dr. McCall
5 testified, Dr. Wecker also, these estimates
6 statistically are no different from zero. That's
7 statistical science. Remember those lower bounds?

8 Zero was in the bound. Write that check for 1.7
9 billion. I got a sophisticated model that
10 statistically can't differentiate from zero, but
11 you're a tobacco company and you're unpopular and you
12 write me a check for 1.7 billion. Sophisticated
13 indeed.

14 So what do they say about this? How do they
15 defend it? Well they say we didn't have -- we
16 defendants didn't have an epidemiologist, we didn't
17 have a biostatistician. But so what? Defendants
18 weren't building the model. Defendants' experts were
19 looking at a model to see if it worked. They tested
20 it and it flunked. Moreover, when defendants'
21 experts looked at the model, they did the same thing
22 the statisticians for plaintiffs did, they took Dr.
23 Samet's testimony and the Surgeon General's reports
24 at face value and ran the numbers. And when they ran
25 the numbers, they came up empty.

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1 Their next complaint is that, well, you know,
2 Dr. Wyant explained the law of averages. Came down
3 here and, you know, coin flip, law of averages. You
4 can't look at 19 to 34, it's all unfair, it all
5 averages out. Poppycock. The law of averages, as
6 Professor Rubin from Harvard told, you doesn't
7 correct error, all it can do is hide it. But Dr.
8 Wecker and Dr. Rubin and Dr. McCall found it because
9 they looked behind it.

10 Third, they say, well, you know, we use very,
11 very common methods here. Don't criticize us. We
12 use regression and this and that. And again the
13 answer: So what? It's common for people to drive in
14 the state of Minnesota, but if you drive on the left
15 side of the road, you got some problems; it's
16 irresponsible. So it may be common to statisticians
17 to use regression, but you use regression like this
18 to prove this and you flunk.

19 Let's start with bias, simple fundamental
20 mistakes. Remember that 720-million-dollar check
21 they want us to write for the 19- to 34-year-old
22 males? That's more money than they claim for the
23 cost of all the major tobacco-related diseases
24 combined in that model. More money for 19- to
25 34-year-old males than for all of those combined.

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1 And as we showed you, the claim is biased
2 through and through. It attributes over 90 percent
3 of their costs to smoking. Wounds, epilepsy,
4 hemorrhoids, kidney donor. Nonsense. And it has the
5 same problem for every age group.

6 You know how many people went into that estimate
7 for which they want 720 million dollars? Twenty-six
8 people got extrapolated. It's bias, pure and simple.

9 You know, I don't want to spend much time
10 because I've got a number of things to cover, but
11 this is one of the charts that relates to the
12 94-year-old women. They claim a hundred and some

13 thousand dollars -- hundred and some million dollars
14 for nursing home, 87 of it attributable from those
15 two 94-year-old women. We've looked at their
16 situation before. Just want to remind you for a
17 second, then I want to move on. You know, age
18 started smoking, 30. Smoked for a couple years, now
19 94. Age started smoking for the other, 80. Smoked
20 for a while, then quit. Write me a check for a
21 hundred million dollars, I got a sophisticated model.
22 Write me that check.

23 Bias is pervasive in this model. Remember they
24 talked -- I don't know if you remember, Dr. Samet
25 said it was critical to compare like to like, and he

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1 said if data on exercise and diet were available, he
2 would have used it because it confounds, it affects
3 heart disease, it affects lots of things. They
4 didn't use the data. Did it make a difference? You
5 bet. When Dr. Wecker put just two additional factors
6 in that model, just two additional factors -- look at
7 that far right -- 46 percent drop. Again, model is
8 sophisticated, it's sophisticated in that everything
9 gets dumped on smoking.

10 Remember Dr. Wecker's chart about when he looks
11 at some of the other factors that plaintiffs have in
12 their model; that is to say, that last chart dealt
13 with things they ignored: exercise, depression, all
14 sorts of factors? Here are things that were in their
15 model, and what Dr. Wecker did is say, okay, well
16 let's play the same approach they took with smoking.
17 Does the model attribute expense to all these other
18 things? Yeah, it does. What it shows you is there's
19 no reasonable basis for the model, that as a matter
20 of statistics, you came up with 171 attributable
21 expense of nonsense.

22 Now Mr. Bleakley mentioned to you earlier that
23 the fundamental problem here, fundamental problem --
24 and no degree of unnatural sophistication can get
25 over it -- is they didn't compare like to like. The

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1 public aid population is a different population, that
2 is undisputed on this record. That's part of the
3 unfortunate reality of life in America, those people
4 are not -- not as fortunate as the general
5 population. They have a lot more health problems.
6 And all they did -- they never did that comparison,
7 public aid non-smoker to public aid smoker. Dr.
8 Wecker did that. He did it four, five, a number of
9 different ways. He did a straightforward average, no
10 smoking-attributable expense. He applied it to the
11 core model for all medical expenditures, no
12 smoking-attributable expense. He applied it to the
13 diminished health status model for all medical
14 expenditures, no smoking-attributable expense.

15 When the public -- public aid data in
16 plaintiffs' own model is looked at, and that's who
17 they're claiming it for, when that data is looked at,

18 smokers don't cost more. And plaintiffs have no
19 principal answer for that whatsoever. First of all
20 they say, well, you guys, defendants, you were
21 comparing average costs. We're doing attributable
22 costs. Remember back to their testimony, they were
23 comparing smokers to non-smokers, they just compared
24 the wrong ones.

25 Second, they said well, you know, we did have --

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1 did have a public aid factor in some of our analyses.
2 But again, it was a proxy, it wasn't the actual
3 information, and it wasn't the analysis that Dr.
4 Wecker's -- Drs. Wecker and McCall looked at.

5 They also said more smokers are on public aid
6 because they smoked more, got a smoking-related
7 disease, became eligible. There's no proof of that.
8 It's hogwash. Dr. Wecker actually looked at it and
9 told you on the stand the percentage of smokers 35
10 and over on public aid was lower than that the
11 general population.

12 Let's talk now for just a few minutes, and I
13 want to get to my last topic on unreliability. When
14 I stood here back in January and talked to you in
15 opening about the plus/minuses, the statistical
16 significances, the margin of error that statisticians
17 use, we talked about how when we you hear about an
18 election poll, you know, plus or minus three percent,
19 plus or minus one percent, and I said you're going to
20 hear evidence that they're going to ask you to
21 believe and to award damages on things that are plus
22 or minus 370 percent? I'm not sure you believed me
23 then, but you've heard it now. That's exactly what
24 it is. This is so unreliable.

25 You know, it relies first of all on missing

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1 data. Remember the blue boxes and the white ones
2 with numbers include -- are data that was made up?
3 Made up. I know you can't read it, I just want to
4 remind you because I remember Dr. Rubin talking to
5 you about that. Dr. Rubin said what they did with
6 this is unprincipled and invalid, it couldn't be
7 trusted.

8 Remember those pluses and minuses again? At the
9 traditional 95 percent confidence level, which is
10 what is used in statistics -- it's what Dr. Wyant, I
11 think, used in his one publication -- at the 95
12 percent confidence level the entire 1.7 billion claim
13 includes zero within its range. It is no different
14 statistically than zero. How on earth can anybody
15 expect a check to be written on that kind of
16 evidence? Remember, that 95 percent is just for
17 standard purposes. To understand that it's not
18 something we just made up, that's a number the state
19 of Minnesota uses, the lower bound, 95 percent, in
20 connection with recovering from Medicaid providers.
21 That's a very accepted standard. It is the standard.

22 Now plaintiffs complain, well, you know, you're

23 not looking at the upper bound. And Dr. McCall from
24 the U of M explained that's nonsense. Your real
25 attention is on the lower bound. Is it different
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1 from zero? Answer: No.
2 Well that's their total damage claim. How --
3 how about if we break it into pieces. What do
4 statistics tell us then? Well this is interesting.
5 You see that number on the left that says 80 percent
6 summary? These aren't statistically significant at
7 95 percent. I want to start you out at the bottom on
8 nursing homes. It's not -- nursing homes aren't
9 significant at 95 percent, the normal standard,
10 they're no different from zero at 90 percent, 80
11 percent, or even 50 percent. It's nothing, nada.
12 It's phony, made-up data off of statistical
13 extrapolations. It's very sophisticated.
14 Diminished health, let's look at that one, 700
15 some million for the 19- to 34-year-old males. We
16 talked about them. But there's even more they want
17 for that. It is not statistically significant at the
18 95, at the 90, or even the 80 percent level. And you
19 didn't hear one witness in this trial tell you they
20 published an article with an 80 percent level. Not
21 one. Because that's not good science, it's not
22 acceptable science.
23 So you go up to the refined disease, we finally
24 find statistical significance, but not at the normal
25 standards, only if we drop it down to the

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1 scientifically unacceptable level of 80 percent. So
2 by taking the Dr. Wyant approach, by abandoning all
3 statistical rules, by using standards that would
4 never be published, you can finally get to something
5 that's statistically significant at 80 percent. It's
6 about 14 percent of the check they're asking us to
7 write, and that's -- that's at 80 percent, and there
8 was no witness in this case who said that anything at
9 80 percent is acceptable.
10 Indeed, one of the interesting facts about what
11 Dr. Wyant talked about was that one of the articles
12 plaintiffs relied upon -- if you -- if you noted,
13 it's Exhibit 18945 -- is an article that did estimate
14 health-care costs attributed to smoking, and
15 plaintiffs relied upon it, and it used a 95 percent
16 confidence level. So it shows, if you want to do it
17 according to statistical rules, you can do it, but if
18 you just want a blank check, you got to take another
19 road to get there, the sophisticated road.
20 I showed you before how Dr. Wyant said it
21 doesn't matter how big the statistical error is.
22 Doesn't matter. It could be plus or minus 10
23 billion, 20 million, hundred billion. Didn't matter
24 to him.
25 Now Dr. Perry, Dr. Cheryl Perry, I don't
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1 remember if you remember this on her cross, she knows
2 something about statistics, she works with it. I --
3 I don't think -- I think she knows a lot more about
4 statistics than she does cigarette advertising, but
5 she knows a lot about statistics. I don't remember
6 if you remember what she said when I asked her about
7 some of these statistical issues. "Professor Perry,
8 you'd never publish work with plus or minus a hundred
9 percent or 170 percent or 300 percent; would you?

10 "Answer: Well that's impossible."

11 And that's right, because this model wouldn't
12 get published.

13 What plaintiffs are left with, really, on this
14 model, and I've gone through it fast, I know you've
15 heard a lot about it, and the reason I've done it
16 that way is because I know you just heard the
17 witnesses last week, at least I think it was last
18 week -- time flies -- but it's important for you to
19 understand how weak this model is and how it's being
20 used as a tool to get these checks written with no
21 proof. So what did plaintiffs say? What they end up
22 doing is they resort to exactly what the court told
23 you in instructions they can't resort to:
24 speculation.

25 The court instructed you, and I'll show you that

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1 in a minute, that on damages, you cannot base them on
2 speculation. So what do plaintiffs say? Smoking
3 causes disease, disease costs money, you owe us
4 money. Has to be there. You got to pay. But the
5 fact of the matter is that's not what their model has
6 proved. We know their model is a sham, we know the
7 94-year women, we know the 19 to 34, we know there's
8 no statistical significance, we know all of that. We
9 know it's garbage. But they brought the model in
10 here, not us.

11 Is it absurd for us not to remake a model for
12 them? Of course not. Furthermore, as Mr. Bleakley
13 explained this morning, it's not an absurd result
14 that when you compare public aid to public aid, even
15 in their model, there's no difference, that there's
16 no smoking-attributable excess expense. That's not
17 absurd at all because public aid is a very different
18 population. It's a special population with lots of
19 risk factors for lots of different things.

20 They want you to speculate that because -- that
21 if you think smoking causes disease, there has to be
22 money there. Put up the proof in the model. It's
23 not there.

24 Indeed, even the general population -- there's
25 an article here, 16747, the Vogt/Schweitzer article,

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1 may be unique because both sides relied on it -- even
2 in the general population that article said you had
3 to be suspect about trying to prove that smokers cost

4 more in general than non-smokers.

5 Let me show you right now the -- remind you what
6 the court told you about damages. The party seeking
7 the damages has to prove the nature, extent, duration
8 and consequences, and they must not be based on
9 speculation or guess. And that's all that's left
10 here is speculation or guess. There has been a total
11 failure of proof on damages. They have played
12 statistical shenanigans with this jury. They kept
13 Dr. Samet from the model, they kept Dr. Miller out of
14 court, they kept Dr. Zeger from the damage estimate
15 and then called it the Zeger model. It was Dr. Wyant
16 who testified to those damages.

17 And you heard the former head of statistics of
18 Harvard, you heard from Dr. Wecker and you heard from
19 Dr. McCall, this was just bad, bad work. And I think
20 that common sense of the people in Minnesota realize
21 that nobody should write a check for one dollar for
22 that kind of work, let alone a check for 1.8 billion
23 dollars, even if you are a tobacco company.

24 For my final topic, ladies and gentlemen, I want
25 to return to that issue touched on earlier about

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1 fundamental fairness, about your job to be fair and
2 just, and I want to talk about that in connection
3 with the plaintiffs' request for damages that go
4 beyond the mere compensation, damages called punitive
5 damages, and I want to start out with one point on
6 that. Make no mistake about it, punitive damages are
7 serious business. His Honor instructed you about
8 punitive damages yesterday afternoon, and they're
9 serious business and that's why there's a higher
10 standard of proof. Mr. Monica mentioned that. Clear
11 and convincing evidence. And that's described in the
12 instructions that you'll have with you in the jury
13 room. And they have to prove by clear and convincing
14 evidence that the defendants acted with deliberate
15 disregard for the rights and safety of others, in
16 light of all the circumstances, deliberate disregard.
17 And there's more to it than that. I -- I don't mean
18 to be misstating the instruction. As you'll
19 remember, it goes on a while. But one of the key
20 parts is deliberate disregard for rights and safety
21 of others, in light of all the circumstances. It's
22 also referred to in another part as conscious or
23 intentional disregard.

24 Now it's because punitive damages are serious
25 business that I want to say for the last few minutes

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1 I have with you, to talk about it, and it's a
2 difficult issue because, as we've talked to you
3 today, I hope you understand our position very, very
4 clearly is the plaintiffs haven't carried their
5 burden of proof on anything in this case, and so by
6 talking to you about punitive damages, I'm not
7 standing here hangdog with my tail between my legs
8 saying don't whip me, what I'm telling you is that I

9 don't think they have a right to any damages, I think
10 on all the matters you have to find -- you should
11 find no liability and no damages and no causation,
12 but I want to talk to you about this now on punitives
13 for a few minutes for that reason I mentioned twice
14 so far, it's serious business, and if I didn't spend
15 some time with you and talk about it in the context
16 of fairness, then I wouldn't be doing a fair job
17 representing my client and the others.

18 Keep in mind those requirements of proof that I
19 touched on, deliberate disregard, intentional or
20 conscious disregard, there's also a reference to
21 concealment in the statute. Because I think the
22 evidence shows here that when you take all of the
23 circumstances into account here, there is no way you
24 can conclude that there's been deliberate disregard
25 for the smokers of America that these companies have

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1 worked to make better and better products for, and
2 there's no way you can show that there was
3 concealment of any fact and circumstance that would
4 have made a difference to the state of Minnesota or
5 Blue Cross or to the smokers.

6 I want to just start for a moment where my
7 friend Mr. Bleakley started months ago on opening,
8 and he touched on it again today, the long debate
9 over tobacco and cigarettes, the most public health
10 controversy in history, year after year, decade after
11 decade, generation after generation, and in 1964 our
12 federal government decided it causes disease, serious
13 disease, but it was nonetheless a product that
14 Americans wanted to buy and it was left on the
15 market. And Congress made a decision you can stay in
16 business, but put these warnings on. And year after
17 year since 1966 those warnings have been on every
18 pack for every smoker who bought them. And almost
19 every year since that labeling act the Surgeon
20 General has issued reports to Congress, reports to
21 the nation, and as Mr. Bleakley told you, not one of
22 them has said smoking is good for you. A constant
23 drumbeat telling people not to do this. Every
24 decision made in this society has been informed by
25 that. Since 1964 our federal government has firmly

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1 believed that smoking causes disease. Year after
2 year the FTC has reported to Congress on cigarette
3 advertising. Congress's judgment has been informed
4 by that. Then in 1971 they reached a new consensus:
5 don't use radio and TV, but you can advertise, but
6 warn in your advertisements, put the warnings on the
7 ads. And the companies did that. And you also heard
8 about the flip-flops with the FTC: you're allowed to
9 advertise tar and nicotine, you're forbidden to
10 advertise tar and nicotine, you must advertise tar
11 and nicotine. Remember that letter Dr. Scheffman
12 took you through from the FTC? All those
13 different -- that history about low tar/low nicotine

14 reporting on the numbers? Very important document
15 for the history of how the government approached
16 this. And the companies complied. The government
17 asked the companies to cooperate in the NCI/TWG, the
18 National Cancer Institute/Tobacco Working Group. The
19 government, like the companies, had through reading
20 of the external literature theories about how to
21 change cigarettes. It asked the companies to
22 participate in whether -- seeing if you could make a
23 less-hazardous cigarette and lots of things were
24 discussed. We showed you government minutes about
25 meetings or suggestions that, if those were documents

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1 of these companies, the plaintiffs' lawyer would be
2 screaming fraud and hypocrisy. I want to show you
3 those.

4 These are government minutes, and I showed you
5 this exhibit, it's AZ993. Here they talk about
6 changing tar-to-nicotine ratio. Since nicotine may
7 play a significant role, it's necessary to consider
8 this. Then it talks about Dr. Tso from the
9 Department of Agriculture. You heard about him. He
10 talked about using a high nicotine tobacco. This is
11 the National Cancer Institute minutes notes.

12 Here's from the next page of the notes. Pivotal
13 issue discussed at the meeting of the National Cancer
14 Institute in the '70s. Nicotine has the greatest
15 pharmacologic activity when it is in the free base
16 form. These are discussions with the government
17 about changing cigarette design. And these companies
18 cooperated. Government terminated that program for
19 political reasons, and you heard that testimony, but
20 the companies continued working toward lower tar and
21 nicotine. You saw evidence that the Surgeon General,
22 the Public Health Service, the FTC, the Hunter
23 Commission in the U.K., the Froggatt Commission, all
24 told these companies, all told the public if you're
25 going to smoke, lower tar is better. If you're going

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1 to smoke, don't smoke the cigarette all the way down
2 to the butt, et cetera, et cetera. The message was
3 out there and the companies responded.

4 Now after all these years Minnesota comes in and
5 Blue Cross comes in and says the FTC testing method
6 is wrong, as if we passed the law on ourselves about
7 the testing method. They come in and say the things
8 like you found in the NCI/TWG notes, that it's
9 sinister, fraudulent, illegal manipulation. But
10 those are the theories in -- in the public health
11 community that people were reacting to, you know,
12 horribly complex issue about how do you develop less
13 hazardous cigarettes? Are they possible?

14 They say the Surgeon General, the FTC, the
15 others are wrong about whether lower tar has in fact
16 a lower lung cancer rate, so they say not only should
17 you find liability, you ought to punish these
18 companies. I submit that's not right. And even more

19 fundamentally, I submit it's not fair.
20 This history we've gone through isn't deliberate
21 disregard, it's not perfect. Not everything was
22 perfect. Mr. Bernick made that point. We step up to
23 it. But this is not a history of deliberate
24 disregard, this is a history of listening to that
25 public health community and responding, working with
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1 the government until they threw us out of TWG and the
2 political winds changed.
3 How can it be deliberate disregard when
4 government and the public health community was
5 participating on suggestions on how to change
6 cigarettes, or where the government passed a law
7 about how we warn and we did it, and to include tar
8 and nicotine and we did that? It's rewriting
9 history. It's revisionism to put punitive damages on
10 these companies.
11 And in this state, as well, you've heard a lot
12 about the relationship between Minnesotan tobacco
13 going back to the prohibition days, going through the
14 more recent years where Minnesota was a, quote,
15 unquote, leader in anti-smoking legislation. You
16 know, Minnesota used its taxing power, Minnesota used
17 its education power, Minnesota used its power for
18 public health to pass all sorts of regulations about
19 smoking. All this shows us is the state of Minnesota
20 has firmly had the belief that cigarettes were
21 unhealthy and addicting, and they believed it for
22 years, that every decision they made has been
23 informed by those beliefs. And that nothing these
24 companies did -- there is no bit of proof in this
25 case that anything these companies did caused

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1 Minnesota to do or not do anything. Put aside the
2 fact they haven't proven a nickel of damages, but
3 there's no proof that anything these companies did
4 caused Minnesota any damage. And that's not fair to
5 expect us to write a check in those circumstances.
6 You heard from Mr. Bible also about that
7 global -- attempt for a global settlement, and he
8 explained to you he thought the way to do that was
9 nationally. He thought compromises needed to be made
10 on both sides. He wanted to be in a position where
11 the companies continued in business making cigarettes
12 better than anybody in the world, and that's what
13 they do, and they wanted to find common ground.
14 That's give-and-take. That's not a basis for
15 punitive damages.
16 You know, back to that issue about children and
17 youth. You'll hear about children on punitive
18 damages, and I think it's because it's easier to talk
19 about children than to say you're asking for money
20 and lots of it. But don't let emotions get in the
21 way of facts. Plaintiffs didn't show you a study by
22 the University of Minnesota researchers who concluded
23 that Minnesota didn't enforce its own youth access

24 laws. We showed that with Professor Perry.
25 Plaintiffs didn't show you Mr. Humphrey's statement
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1 that the best way to stop smoking was to crack down
2 on illegal sales. Plaintiffs didn't tell you about
3 the Right Decisions Right Now program of R. J.
4 Reynolds, which, as Mr. Schindler said, will be in 90
5 percent of the middle schools in America later this
6 year. It's the Law, We Card. The whole issue of the
7 youth access is one designed to get you angry. But
8 remember, these companies don't sell cigarettes to
9 underage people in Minnesota, they don't sell them to
10 legal smokers in Minnesota. Minnesotans sell
11 cigarettes to underage people of Minnesota and to
12 people of age. That's why these retail programs
13 we've talked about here are important.

14 Now what was plaintiffs' response? The best
15 they suggested when Mr. Gill was cross-examining Mr.
16 Morgan, these companies ought to undertake private
17 sting operations. You remember that? A monumently
18 absurd idea. Private companies running private sting
19 operations, boom mikes, surveillance cameras, black
20 bags, hats. Who wants to live in that kind of
21 America? What kind of misplaced priority is that?

22 I think, ladies and gentlemen, the unfortunate
23 fact is the state and Blue Cross are looking for a
24 scapegoat about youth smoking. It is a complex
25 issue. It is an unfortunate phenomenon. But I ask

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1 you to separate emotion from fact and not allow the
2 scapegoating.

3 There will also be discussion about safer
4 cigarettes and on and on. Well we've heard a lot
5 about that. I don't think anybody says it any better
6 than the Surgeon General did back in 1978, "Thus, as
7 long as warnings of health hazards from smoking are
8 disregarded and as long as cigarettes are consumed,
9 efforts towards a reduction of tar and smoke
10 components" should be undertaken.

11 If you're not going to listen to the warning,
12 then the companies ought to continue to reduce. And
13 they did. And the market's going down, and the
14 companies know that.

15 You heard about Premier, Eclipse, Next, Accord.
16 You heard about what the state of Minnesota did when
17 Premier came out. They wrote to the FDA and they
18 said take it off the shelf.

19 Now one last issue on this. I want to talk
20 about company profits. Remember Mr. Much talked
21 about company profits? Mr. Much had a big inflated
22 number for company profits. Why? Because they
23 weren't company profits. They include global
24 earnings. They didn't take account of debt and
25 interest, they didn't take account of income taxes

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1 and taxes of that type. But on cross-examination Mr.
2 Much did end up coming up with a number. He
3 disagreed with it, make no mistake, he disagreed, but
4 he said if you take taxes and take care of your
5 interest and that, what's the number that this
6 industry has had as income from the state of
7 Minnesota? 350 million dollars over the years,
8 total. That's profit after taxes, after interest.
9 Not billions, not one billion, 350 million. Mr.
10 Much's -- in Mr. Much's calculation, that's five
11 cents a pack.

12 So even if you believe, and I don't think you
13 will because I don't think the evidence supports it
14 in any way, shape or form, but even if you were to
15 believe everything the plaintiffs' lawyer will tell
16 you tomorrow as he demonizes this industry, plucks
17 events out of context, ignores this history we've
18 talked about, if you were to believe everything he
19 said and you were to fall for this Kirby Puckett
20 videotape of errors and strikeouts, you still have to
21 ask the question: What difference did all of this
22 make to the smokers in Minnesota or to these
23 plaintiffs? Did anything cause the public to
24 disbelieve that smoking caused disease? Did anything
25 cause the public to think smoking was good for them?

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1 Did the state of Blue -- state or Blue Cross believe
2 smoking is healthful? Did anything these companies
3 did cause the public health community to doubt
4 whether smoking causes disease, caused the federal
5 government to take warnings off the packs, cause the
6 state of Minnesota not to regulate, not to educate?
7 Did anything these companies did stop them from
8 innovating and making the world's leading products?
9 Did it prevent these companies from cooperating with
10 the National Cancer Institute until the National
11 Cancer Institute didn't want to? No. Believe the
12 worst: Didn't make any difference. And it's an odd
13 situation because of the uniqueness of tobacco in our
14 society. It's because of the uniqueness of this
15 controversy and its public nature.

16 Is it fair to come here in May 1998 and second-
17 guess the entire way our society has chosen to deal
18 with cigarettes over these many years? Is it fair to
19 secondguess all the way back to 1953, the first year
20 of the Eisenhower administration, and apply present
21 thinking to that?

22 Ladies and gentlemen, we on the defense side
23 have reached the end of our time with you, and I
24 again want to spend a minute thanking you for what I
25 can only say is really extraordinary patience. This

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1 has been a lot of long days. Today has been, I
2 think, the longest. I want to thank you for the
3 courtesy and commitment you've shown to everyone
4 here, for your dedication, which is a civics example

5 to all of us. And I'm sure that whatever the result,
6 that no one here, lawyers or jury, will ever forget
7 this experience and the road we've traveled together.

8 I do have just a few last requests for you.
9 Again, keep in mind we don't go last. Statements can
10 be made that we can't rebut even though we have
11 evidence and reasons and arguments. So I ask you
12 again, think critically when you hear things. Think
13 critically. And when you're in those deliberations,
14 think about what I might ask or what evidence I might
15 turn to just to make sure how it balances. If you
16 see a document, read the whole document. Don't take
17 a quote out of context. Look at other contextual
18 documents. Don't fall for the distorted video clip.

19 And keep in mind the importance of each of your
20 own individual convictions. You're a jury, but
21 you're still individuals. You know, you've got to
22 work together. But as Your Honor told you, your
23 convictions as individuals matter. Only you can
24 determine, in light of the law and the facts, this
25 dispute over all these years. So with full

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1 confidence that you will, I ask you again: Separate
2 fact from emotion, separate what made a difference
3 from what didn't, keep in mind this incredible
4 history we've been through over 53 years in this
5 country, cigarettes being so popular, so accepted
6 back then, President Eisenhower, to today, perhaps,
7 with the fall of the Soviet empire, the most hated
8 thing in America. And remember that your job, your
9 solemn job is to bring that concept of fairness and
10 justice. Only you can do that. You are what
11 separates political noise, popular will, you're what
12 separates us from countries of mob rule, because you
13 make the judgments. Only the people in that box will
14 make these decisions, not the politicians, not the
15 media, and you'll do it on evidence and the law His
16 Honor gave you.

17 Again, in the end we ask you to find for the
18 defendants on all counts and against the plaintiffs,
19 and I thank you from the bottom of my heart for all
20 of your attention over all these many weeks.

21 Thank you. Thank you, Your Honor.

22 THE COURT: All right. Ladies and
23 gentlemen, we will be recessing at this time and
24 reconvene tomorrow morning at 9:00 o'clock. Again
25 like I told you before, if you get here at 9:30,

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1 you'll be a half hour into the final argument. But
2 we will be starting the final argument of the
3 plaintiffs at 9:00 o'clock. Would ask the jury if
4 they could be present at approximately 8:30 to 20
5 minutes to 9:00. And we will recess now.

6 THE CLERK: Court stands in recess to
7 reconvene tomorrow morning at 9:00 a.m.

8 (Recess taken.)

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